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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 263.

ROBERT HAYES, A MINOR, BY GEORGE C. FRY, HIS NEXT FRIEND, PLAINTIFF IN ERROR,

VS.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JULY 18, 1881.

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1 Pleas in the Circuit Court of the United States for the northern district of Illinois, held at the United States Court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Tuesday, the first day of February, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and fifth year.

WILLIAM H. BRADLEY, *Clerk.*

ROBERT HAYES, a minor, by GEORGE C. FRY, his next friend,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY.
} Case.

NORTHERN DISTRICT OF ILLINOIS, *ss.*

Be it remembered that on the thirteenth day of December, A. D. 1879, there was filed in the office of the clerk of the Circuit Court of the United States for the northern district of Illinois, at Chicago, in said district, a transcript of the record from the Circuit Court of Cook county, Illinois, and a bond for costs in said above-entitled cause, which said bond and transcript of record are in the
2 words and figures following, to wit:

Bond for Costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss.*

Circuit Court, ——— term, A. D. 1879.

ROBERT HAYES, a minor, by next friend, etc.,
vs.
MICHIGAN CENTRAL RAILROAD CO.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the defendant of any costs ordered or adjudged to be paid it I hereby agree and stipulate that execution may issue against my property for any costs taxed against it. Dated this thirteenth day of December, A. D. 1879.

CHAS. L. ALLEN.

(Endorsed:) Filed Dec. 13th, A. D. 1879. W. H. Bradley, clerk.

Transcript of Record.

3 UNITED STATES OF AMERICA, STATE OF ILLINOIS,
Cook County, } *ss.*

Pleas before the Honorable T. A. Moran, one of the judges of the Circuit Court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 17th day) of November, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th.

Present, Honorable T. A. Moran, one of the judges of the Circuit Court of Cook county, State of Illinois.

L. L. MILLS,
State's Attorney.
JOHN HOFFMAN,
Sheriff.

Attest: JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 14th day of October, A. D. 1878, Robert Hayes, a minor, by his next friend, George C. Fry, esq., his attorney, filed in said court his certain præcipe, and caused to be issued out of said court under the seal thereof 4 the people's writ of summons, directed to the sheriff of Cook county to execute, which said præcipe and writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

Præcipe.

STATE OF ILLINOIS, } ss.
Cook County, }

Circuit Court of Cook county. To the October term, A. D. 1878.

ROBERT HAYES, a minor, by GEO. C. FRY, his next friend, plaintiff,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, defendant.
} Case.
Damages, $10,000.00.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case to the damage of said plaintiff in the sum of ten thousand dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the October term of said court, A. D. 1878.

GEO. C. FRY,
Plaintiff's Attorney.

To JACOB GROSS, esq., *Clerk.*

Chicago, August 22, 1878.

5 *Summons.*

STATE OF ILLINOIS, } ss.
Cook County, }

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon the Michigan Central Railroad Company, if it shall be found in your county, personally to be and to appear before the Circuit Court of Cook county, on the first day of the term thereof to be holden at the court-house in the city of Chicago, in said Cook county, on the third Monday of October next, to answer unto Robert Hayes, a minor, by Geo. C. Fry, his next friend, in a plea of trespass on the case to the damage of said plaintiff, as it is said, in the sum of ten thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, Jacob Gross, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 22d day of August, A. D. 1878.

[SEAL.] JACOB GROSS,
Clerk.

6 (Endorsed:) Served the within writ upon the within-named the Michigan Central R. R. Co., by delivering a copy thereof to A. S. Osborn, solicitor of said company, the president not found in my county, this 11th day of October, 1878. Charles Kern, sheriff; by Emil Hoechster, deputy; $1 paid.

And thereupon, on the 8th day of November, A. D. 1878, there was filed in said cause a certain narr in the words and figures following, to wit:

STATE OF ILLINOIS, } ss.
County of Cook, }

In the Circuit Court of Cook county, of the October term, A. D. 1878.

ROBERT HAYES }
vs. }
THE MICHIGAN CENTRAL RAILROAD COMPANY. }

Robert Hayes, a minor, the plaintiff, by George C. Fry, his next friend and attorney, complains of the Michigan Central Railroad Company, the defendant, of a plea of trespass on the case. 7

For that whereas heretofore, to wit, on the 17th day of March, A. D. 1878, the said defendant was doing business as a railroad corporation in the county and State aforesaid, and was possessed and in the use of, and did then and there use and operate, a certain railroad track extending through a portion of the ground lying immediately east of and adjoining the premises known as Lake Park, or Lake Front Park, in the city of Chicago, in the county aforesaid, with a certain locomotive engine and train of cars attached thereto, and which said locomotive engine and train were then and there under the care and management of divers then servants of the said defendant, and who were then and there driving the same upon and along the said track.

The plaintiff further avers that the said track was then and there

the property of the Illinois Central Railroad Company, a railroad corporation duly organized under the laws of the State of Illinois, and that the defendant was on the day and year and at the
8 place first aforesaid using and operating said track, and driv-
ing the said locomotive engine and train upon and along the same, by and with the consent and knowledge and permission of the said Illinois Central Railroad Company.

The plaintiff further avers that the said Illinois Central Railroad Company constructed the said track at the place aforesaid by the permission of the city of Chicago and by virtue of an ordinance duly passed by the common council of said city on the 14th day of June, A. D. 1852, and that the said Illinois Central Railroad Company accepted the said ordinance within the time required of it in and by the terms of said ordinance, and afterwards, to wit, more than five years prior to the time first above in this count mentioned, constructed and have ever since maintained and used the said track; and plaintiff further avers that the said track is on a portion of the ground used as a main track by said Illinois Central Railroad Company, within the limits of said city of Chicago and on the lake shore.

9 The plaintiff further avers that by the terms and conditions of said ordinances it was the duty of said Illinois Central Railroad Company to erect and maintain on the western line of the ground used as a main track of said Illinois Central Railroad Company such suitable walls, fences, or other sufficient works as would secure persons from danger. Yet the said Illinois Central Railroad Company, not regarding its duty as aforesaid, did not before the time first above in this count mentioned, nor did the said defendant, nor did any other person for said Illinois Central Railroad Company or said defendant erect, nor then and there maintain, on the western line of the ground used for its main track at the place first above in this count stated, any suitable walls, fences, or other sufficient works as would secure persons from danger.

By means whereof and by reason of the want of such walls, fences, or other suitable works on the western line of said track, the plaintiff went upon the said track, and while exercising ordinary
10 care and caution the said locomotive engine and train of cars,
then and there under the care and management of the said servants of the said defendants as aforesaid, ran and struck against the plaintiff, by means whereof the plaintiff was with great force and violence thrown down and a portion of said train ran over one of plaintiff's arms, and thereby one of plaintiff's arms was severed from his body, and by reason thereof the plaintiff was also compelled to have such arm amputated at or near the shoulder joint; and the plaintiff was otherwise greatly wounded, bruised, and injured; and also by means of the premises the plaintiff became and was sick, sore, lame, and disordered, and so continued and remained for a long space of time, to wit, hitherto, during all of which said time the plaintiff suffered and underwent great pain, and by means of the premises the plaintiff has also been permanently deprived of the use

and benefit of his said arm in obtaining his support and maintenance;
and thereby the plaintiff was also forced and obliged to and did then
and there pay, lay out, and expend divers large sums of
11 money, amounting in the aggregate to the sum of, to wit, two
hundred dollars, in and about the endeavoring to be cured of
said wounds, bruises, disorders, and injuries so received by him as
aforesaid.

And whereas, also, the said defendant, on the 17th day of March,
A. D. 1878, had the right to use, operate, and run engines and trains
upon a certain railroad track extending through a portion of the
ground lying immediately in front of and adjoining the ground
known as Lake Park, or Lake Front Park, in the city of Chicago, in
the county aforesaid, and did then and there so use and operate the
same; and the plaintiff avers that the said railroad track was on the
day and year last aforesaid the property of the Illinois Central Railroad
Company, and that said railroad track had been open for use,
and the same was used by the said defendant by and with the consent,
knowledge, and permission of said Illinois Central Railroad
Company for more than five years prior to the date first
12 above in this count mentioned.

The plaintiff further avers that by an ordinance of the city of Chicago, duly passed by its common council before the said track was constructed by the said Illinois Central Railroad Company, it was the duty of the Illinois Central Railroad Company to erect and maintain on the western line of the ground used for said track such walls, fences, or other sufficient works as would secure persons from damage.

The plaintiff further avers that the said Lake Park, or Lake Front
Park, was on the day first above in this count mentioned, and for a
long period previous thereto, to wit, for the period of five years and
upwards, a park or common, open to the public and lying and
being on the shore of Lake Michigan, in said city of Chicago, with
only the tracks belonging to said Illinois Central Railroad Company
lying between said park and the shore of said lake, and that the said
park was during said time, and is now, used extensively as a common
or play-ground or place of resort by children and others
13 living in its vicinity and neighborhood, and that the said park
is located in the vicinity of a densely inhabited portion of
said city, and immediately west of and adjoining the track first hereinabove
mentioned; all of which facts were on the day and year
first above herein mentioned and for a long time prior thereto, to
wit, the period of five years prior thereto, and known to the defendant
and said Illinois Central Railroad Company.

The plaintiff further avers that for a long period of time prior to the day and year first above in this count mentioned, and on such date, the said Illinois Central Railroad Company allowed divers other railroad companies besides said defendant to use, and such other railroad companies did so use the track first above in this count mentioned and run and operate their trains upon and over the same, and which fact the plaintiff avers was well known to the defendant on the day and year first above herein mentioned.

And plaintiff avers that on the day and year and at the place first aforesaid there was no fence, wall, or other sufficient 14 works suitable to protect persons from danger or prevent children while playing upon and around said park from straying or entering upon the track used by the defendant as aforesaid; and plaintiff further avers that notwithstanding its said duty the said Illinois Central Railroad Company did not erect or on the day and year and at the place first above in this count mentioned maintain such suitable walls, fences, or other works, nor did the said defendant or any other person erect or then or there maintain such suitable walls, fences, or other works.

By reason whereof and by reason of the want of such fences, walls, or other sufficient works at the time first aforesaid and at the place first aforesaid, this defendant strayed upon the said track, and was struck and run over by a portion of a train of cars then and there under the care, custody, and control of the then divers servants of the said defendant, and thereby one of the plaintiff's arms was severed from his body, and by reason thereof the plaintiff 15 was also compelled to have such arm amputated at the shoulder joint; and the plaintiff was also thereby otherwise wounded, bruised, and also by means of the premises the plaintiff became and was sick, sore, and disordered, and so continued and remained for a long space of time, to wit, hitherto, during all of which time the plaintiff suffered and underwent great pain, and by means of the premises the plaintiff has also been permanently deprived of the use and benefit of his said arm in obtaining his support and maintenance; and thereby the plaintiff was forced and obliged to and did then and there pay, lay out, and expend divers large sums of money, amounting in the aggregate to the sum of, to wit, two hundred dollars, in and about the endeavoring to be cured of said wounds, bruises, and disorders so received by him as aforesaid.

To the damage of the said plaintiff of ten thousand dollars; and therefore he brings his suit, etc.

GEO. C. FRY,
Attorney for and next friend of said Robert Hayes.

16 And thereupon, on the 10th day of December, A. D. 1878, there was filed in said cause a certain demurrer to first and second counts of said declaration, in the words and figures following, to wit:

STATE OF ILLINOIS, } ss.
County of Cook,

In the Circuit Court of Cook co., December term, A. D. 1878.

ROBERT HAYES
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } Trespass on the case.

And the said defendant, the said the Michigan Central Railroad Company, by Andrew L. Osborn, its attorney, comes and defends, &c., when, &c., and says that the said first count of the said declaration and the matters herein contained, in manner and form as the same are thereinabove set forth, are not sufficient in law for the said plaintiff to maintain his aforesaid action, and that it, the 17 said defendant, is not bound by law to answer the same; and this said defendant is ready to verify. Wherefore, the want of a sufficient first count of said declaration in this behalf, said defendant prays judgment, and that the said plaintiff may be barred from maintaining his action aforesaid on said count, &c.

And as to the second count of said declaration, said defendant says that the same and the matters therein contained, in manner and form as the same are thereinabove set forth, are not sufficient in law for said plaintiff to maintain his aforesaid action, and that it, the said defendant, is not bound by law to answer the same; and this said defendant is ready to verify. Wherefore, for want of a second sufficient count of said declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from maintaining his aforesaid action on said count, &c.

ANDREW L. OSBORN,
Attorney for said Defendant.

18 And thereupon, on the 7th day of March, A. D. 1879, the following proceedings were had and entered of record in said court, to wit:

ROBERT HAYES, a minor, by GEORGE C. FRY, his next friend,
7131 *v.* } Case.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

This day came the said plaintiff, by his attorney, and confessed the demurrer to the declaration on file herein, and on his motion leave is granted him to file amended counts, and to file additional counts to said declaration within 10 days from this date.

And thereupon, on the 11th day of March, A. D. 1879, there was filed in said cause a certain amended narr, which is in the words and figures following, to wit:

19 STATE OF ILLINOIS,
County of Cook, } *ss.*

Circuit Court of Cook county, of the —— term, A. D. 1879.

ROBERT HAYES
v.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } Amended Narr.

Robert Hayes, a minor, by George C. Fry, his next friend and attorney, complains of the Michigan Central Railroad Company, a railroad corporation doing business in said State of Illinois, the defendant, of a plea of trespass on the case.

For that whereas heretofore, to wit, on the 17th day of March, in the year of our Lord one thousand eight hundred and seventy-eight, the said defendant was doing business as a railroad corporation in the county and State aforesaid, and was then in use of, and did then and there use and operate, a certain railroad track extending through a portion of the ground lying immediately east of and adjoining the premises known as the Lake Park, or Lake Front Park, in
20 the city of Chicago and the county aforesaid, with a certain locomotive engine and a train of cars attached thereto, and which said locomotive engine and cars were then and there under the care and management of the divers then servants of the said defendant, and who were then and there driving the same upon and along the said track.

The plaintiff further avers that the said track was then and there the property of the Illinois Central Railroad Company, a railroad corporation also doing business in the said Cook county, and that the defendant was, on the day and year and at the place first above in this count stated, using and operating the said track and driving the said locomotive engine and train of cars upon and along the same by and with the consent and knowledge of the said Illinois Central Railroad Company.

The plaintiff further avers that said Illinois Central Railroad Company constructed the track above in this count stated by the permission of the city of Chicago and by virtue of an ordinance duly passed by the common council of said city on the 14th day of June,
21 A. D. 1852, and that the said Illinois Central Railroad Company accepted the terms and conditions of the said ordinance, and afterwards, to wit, more than five years prior to the date first above in this count stated, constructed, and have ever since maintained and used, the said track.

The plaintiff further avers that it was provided in and by the said ordinance that "the said company" (meaning and intending thereby the said Illinois Central Railroad Company) should erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore such suitable walls, fences, or other sufficient works as would prevent animals from straying upon or obstructing its tracks and secure persons and property from danger.

And plaintiff avers that the track first above in this count mentioned is on a portion of the ground pointed out and used by said Illinois Central Railroad Company for its main track on the lake shore, in said city of Chicago; and that by reason of the terms and
conditions of the said ordinance it was the duty of said Illi-
22 nois Central Railroad Company to erect and maintain at the
place first above in this count mentioned such suitable walls,
fences, or other sufficient —— as would secure persons from danger. Yet the said Illinois Central Railroad Company, not regarding its said duty in the premises, did not, before or at the time first above in this count mentioned, nor did the said defendant, nor did any other person for said Illinois Central Railroad Company, or said defendant, erect, nor then and there maintain at the place first above in this count mentioned, any suitable walls, fences, or any suitable works as would secure persons from danger.

By means whereof and by reason of the non-erection and maintenance of such walls, fences, or other suitable —— on the western line of the track first above mentioned the plaintiff, who was on the day and year first hereinabove mentioned a child between the age of eight and nine years, and a deaf and dumb person, while exercising due care and caution for a person of his age, knowledge, capac-
ity and experience, strayed upon the track first hereinabove
23 mentioned, to wit, on the day first hereinabove mentioned,
when the said locomotive engine and cars attached thereto,
then and there under the care and management of the said servants of said defendant as aforesaid, ran and struck against the plaintiff.

By means whereof the plaintiff was, with great force and violence, thrown down and a portion of said train of cars ran over one of plaintiff's arms, and thereby such arm was severed from his body, and by reason thereof it became necessary and the said arm was amputated at or near the shoulder joint, and the plaintiff was otherwise greatly injured, wounded, and bruised; and also by reason of the premises the plaintiff became and was sick, sore, lame, and disordered, and so continued and remained for a long space of time, to wit, from thence hitherto, during all of which time the plaintiff suffered and underwent great pain; and by reason of the premises the plaintiff has also been permanently deprived of the use and benefit of the said arm in obtaining his support and maintenance, (and thereby
the plaintiff was forced and obliged to and then and there
24 pay, lay out, and expend divers large sums of money, amount-
ing in the aggregate to the sum of, to wit, the sum of two
hundred dollars, in and about the endeavoring to be healed and cured of the said wounds, bruises, disorders, and injuries so received by him as aforesaid.)

Second Count.

And whereas, also, the said defendant afterwards, to wit, on the 17th day of March, A. D. 1878, had the right to use, operate, and run the engines and trains of said defendant upon and over a cer-

tain railroad track belonging to the Illinois Central Railroad Company, and extending through a portion of the ground upon the lake shore of Lake Michigan, and also lying immediately east of and adjoining the ground known as the Lake Park, or the Lake Front Park, in the city of Chicago and the county of Cook aforesaid, and that the said defendant did then and there so use and operate the said track by and with the license and permission of said Illinois Central Railroad Company for a long period of time prior thereto, to wit, for the period of five years prior to the date first herein-
25 above in this count mentioned.

The plaintiff further avers that it was provided in and by a certain ordinance of the city of Chicago, duly passed by the common council of said city before the construction of the said track by the said Illinois Central Railroad Company, that the said Illinois Central Railroad Company to erect and maintain on the western line of the ground used for said track such suitable walls, fences, or other sufficient works as would secure persons from danger; and plaintiff further avers that the said track was constructed by the said Illinois Central Railroad Company by and with a full knowledge on the part of said Illinois Central Railroad Company of the terms and conditions of said ordinance.

And plaintiff further avers that the said Lake Park, or Lake Front Park, at the place first above in this count stated, was on the day and year first above in this count stated, and for a long period of time previous thereto, to wit, for the period of five years and upwards, a park or common open to the public and lying and being on
26 the shore of Lake Michigan, in said city of Chicago, with
only the tracks belonging to said Illinois Central Railroad Company lying between said park and the shore of said lake, and that said park was on the day and year first above in this count stated, and also for a long space of time prior thereto, to wit, for the period of five years, was a place of common resort or play-ground for children and others living in the vicinity and neighborhood of said park, in said city; all of which facts were, on the day and year first above in this count stated, and for a long period of time prior thereto, to wit, for the period of five years, well known to the said defendant and the said Illinois Central Railroad Company.

And plaintiff further avers that by reason of the said ordinance and by reason also of the premises it was the duty of said Illinois Central Railroad Company on the day and year and at the place first above in this count mentioned to erect and then and there maintain such suitable walls, fences, or other sufficient works as would
27 protect persons from danger. Yet the said Illinois Central
Railroad Company, not regarding its duty in the premises, did not, nor did the said defendant, nor did any other person for the said Illinois Central Railroad Company or said defendant, on the day and year and at the place first above in this count mentioned, erect nor then and there maintain such suitable walls, fences, or other sufficient works as would protect persons from danger.

And plaintiff further avers that on the day and year first above in this count stated the said track was used by divers other railroad companies beside said defendant, and by the license of said Illinois Central Railroad Company, and which fact the plaintiff avers was well known to the said defendant.

And plaintiff avers that on the day and year first above in this count stated he was a minor of the age of about 9 years, and a deaf and dumb person, and that while on said last-mentioned date he was playing in the said park, and at the place first above herein stated, as he lawfully might, by reason of the want of suitable walls,
28 fences, or other sufficient works to protect persons from danger, he ran or strayed upon the said track at the place hereinabove in this count first stated, and was then and there struck and run over by a portion of a train of cars then and there under the care, custody, and control of the then divers servants of the said defendant, and who were then and there operating the said train upon and over the track first hereinabove in this count mentioned, and thereby one of the plaintiff's arms was severed from his body, and by reason thereof the plaintiff was also compelled to and did have such arm amputated at his shoulder, and plaintiff was otherwise greatly wounded, bruised, and injured; and by reason of the premises the plaintiff also became sick, sore, lame, and disordered, and so continued for a long space of time, to wit, hitherto, during all of which time plaintiff suffered and underwent great pain; and by means of the premises the plaintiff has also been deprived of the use and benefit of his said arm in obtaining the means of his livelihood.

29 *Third Count.*

For that whereas afterwards, to wit, on the 17th day of March, A. D. 1878, the said defendant was carrying on the business of a railroad corporation in said county of Cook, and then and there, by the license of the Illinois Central Railroad Company, the owner thereof, was using and running the engines and cars of said defendant upon and over certain railroad tracks lying and being imme. east and adjoining the premises known as Lake Park, or the Lake Front Park, in the city of Chicago, in said Cook county.

The plaintiff further avers that the said tracks were also on the day and year aforesaid, and for a long period of time prior thereto, to wit, the period of five years prior thereto, used by divers
30 other railroad companies beside the defendant and said Illinois Central Railroad Company, and with the license of the latter company, for the purpose of running their respective engines and trains of cars thereon, which facts were well known to defendant on the day and year aforesaid.

The plaintiff further avers that the said Lake Park, or Lake Front Park, is a large park or common, with only the ground upon which the said tracks are located lying between said park and the shore of Lake Michigan; that the said park is in the immediate vicinity of a densely inhabited portion of said city of Chicago, and open to the public; and said park was on the day and year aforesaid, and for a long period of time prior thereto, to wit, for the period of five years prior thereto, used extensively as a common or play-ground for children and a place of resort for others living in the vicinity. The plaintiff further avers that on the day and year and at the place first above herein aforesaid there were no fences separating the said tracks from the said park, nor any other means or precautions 31 made use of by the said defendant to prevent children or others from straying or running upon said tracks while playing upon said common or park.

The plaintiff further avers that on the day and year and at the place first above in this count mentioned the said defendant did then and there use and operate the said tracks with a certain locomotive engine and train of cars attached thereto, then and there under the care and management of the divers then servants of said defendant, and who were then and there driving the same upon and along said track; and plaintiff further avers, while the said engine and train of cars were so under the care and management of the said servants of said defendant, the said servants of the defendant so negligently, carelessly, and improperly managed and conducted the same, that while the plaintiff, who was then and there a minor, a child of about the age of 9 years, and who was then and there playing upon the said common or park, and using and exercising due care and caution, 32 and who then and there by reason of the premises strayed or ran upon said track, was struck by the said cars so under the care and management of said servants of said defendant, and was with great force and violence thrown down, and a portion of said train of cars ran over one of plaintiff's arms, and thereby such arm was severed from his body, and by reason thereof the plaintiff was compelled and did have such arm amputated at the shoulder joint, and plaintiff was otherwise greatly injured, wounded, and bruised; and also by reason of the premises the plaintiff became and was sick, sore, lame, and disordered, and so continued and remained for a long space of time, to wit, from thence hitherto, during all of which time the plaintiff underwent and suffered great pain; and by reason of the premises the plaintiff has been deprived of and lost the use and benefit of the said arm in supporting himself and following the usual avocations in obtaining his livelihood.

To the damage of the plaintiff of ten thousand dollars; and therefore he brings this suit, etc.

GEORGE C. FRY,
Next Friend and Attorney.

33 And thereupon, on the 10th day of September, A. D. 1879, there was filed in said cause a certain plea of general issue, in the words and figures following, to wit:

State of Illinois, } ss.
Cook County,

Circuit Court of Cook county, September term, A. D. 1879.

The Michigan Central Railroad Company
ats.
Robert Hayes.
} Action on the case.

And the said defendant, by A. L. Osborne, its attorney, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the said plaintiff has above thereof complained against it; and of this the said defendant puts itself upon the country, &c.

A. L. OSBORNE,
Defendant's Attorney.

34 And thereupon, on the 11th day of December, A. D. 1879, there was filed in said cause a certain affidavit, petition, and bond for removal to U. S. Circuit Court, which said affidavit, petition, and bond are in the words and figures following, to wit:

Affidavit.

State of Illinois, } ss.
Cook County,

In the Circuit Court of Cook county.

Robert Hayes, by his next friend, etc.,
v.
The Michigan Central Railroad Company.

State of Michigan, } ss.
County of Wayne,

H. B. Ledyard, being first duly sworn, deposes and says that he is the general manager of the Michigan Central Railroad Company, 35 defendant in the above-entitled cause, and is authorized to make this affidavit; that he has reason to believe, and does believe, that from prejudice and local influence the said defendant company will not be able to obtain justice in said State court.

H. B. LEDYARD.

Subscribed and sworn to by H. B. Ledyard, before me, this 29th day of November, A. D. 1879.

[SEAL.] JOHN E. GRIFFITHS,
Notary Public, Wayne County, Michigan.

Petition.

STATE OF ILLINOIS, }
County of Cook, } *ss.*

In the Circuit Court of Cook county.

ROBERT HAYES, by his next friend, etc.,
v.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

36 Petition of said defendant for the transfer of said cause to the Circuit Court of the United States for the northern district of Illinois.

Comes the said defendant, Michigan Central Railroad Company, and petitions for the removal of the above-entitled cause to the Circuit Court of the United States for the northern district of Illinois, and shows as cause therefor that the said plaintiff is and was at the time of the commencement of said suit a citizen and resident of the State of Illinois.

That your petitioner, defendant in said cause, is a corporation created and existing solely under and by virtue of the laws of the State of Michigan, and so is and was at the time of the commencement of the said suit a citizen and resident of the State of Michigan and not elsewhere.

That the matter and amount in dispute in said suit exceeds the sum of five hundred dollars, as will appear by the declaration filed by plaintiff in said cause, wherein plaintiff seeks to recover of defendant the sum of ten thousand dollars as damages.

That said suit has not been tried, but is now pending for trial in this court.

37 And petitioner further states that it has filed the affidavit required by the act of Congress in such cases, and offers herewith its bond, with good and sufficient surety, conditioned as by the act of Congress required.

Wherefore petitioner prays that said cause may be removed to the Circuit Court of the United States for the northern district of Illinois, in accordance with the act of Congress in such case made and provided.

THE MICHIGAN CENTRAL R. R. CO.,
By H. B. LEDYARD, *G. M.*

STATE OF MICHIGAN, }
County of Wayne, } *ss.*

H. B. Ledyard, being first duly sworn, deposes and says that he is the general manager of the Michigan Central Railroad Company, petitioner in the foregoing petition, and is authorized to make this affidavit; that he has read said petition and knows the contents thereof, and that the same are true, as he verily believes.

H. B. LEDYARD.

Subscribed and sworn to by H. B. Ledyard, before me, this 29th day of November, A. D. 1879.

[SEAL.] JNO. E. GRIFFITHS,
Notary Public, Wayne County, Mich.

38 *Bond.*

Know all men by these presents, that we, the Michigan Central Railroad Company, as principal, Andrew L. Osborne, of La Porte county, in the State of Indiana, and Henry C. Wentworth, of the county of Cook and State of Illinois, as sureties, are held and firmly bound unto Robert Hayes in the penal sum of five hundred dollars, for the payment of which well and truly to be made we bind ourselves, our successors, heirs, representatives and assigns, jointly and severally, firmly by these presents.

In witness whereof, the said Michigan Central Railroad Company has caused its corporate name to be hereto affixed, and the said Osborne and Wentworth have hereto set their hands and seals this 29th day of November, A. D. 1879.

39 The condition of the above obligation is such, that whereas the above bounden Michigan Central Railroad Company has filed its petition in the Circuit Court of Cook county, State of Illinois, in a certain cause therein pending, wherein the said Robert Hayes is plaintiff and the said Michigan Central Railroad Company is defendant, for the removal of said cause to the Circuit Court of the United States for the northern district of Illinois:

Now, if the said Michigan Central Railroad Company, petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

[CORP. SEAL.] THE MICHIGAN CENTRAL R. R. CO.,
By H. B. LEDYARD, *G. M.*
ANDREW L. OSBORN. [SEAL.]
HENRY C. WENTWORTH. [SEAL.]

40 STATE OF ILLINOIS,
County of Cook. }

Henry C. Wentworth, being duly sworn, deposes and says that he is a resident of said county of Cook and a property holder therein; that he is worth the sum of five hundred dollars over and above all his debts and liabilities, and exclusive of property by law exempt from execution; that he has property in said county of Cook liable to execution of the value of more than five hundred dollars.

HENRY C. WENTWORTH.

Subscribed and sworn to by Henry C. Wentworth, before me, this 9th day of December, A. D. 1879.

[SEAL.] LESTER O. GODDARD,
Notary Public, Cook County, State of Illinois.

And thereupon, on the same day, to wit, the 11th day of December, A. D. 1879, the following proceedings were had and entered of record in said cause, to wit:

41 ROBERT HAYES, a minor, by GEO. C. FRY, his next friend,
29471; 1824. *v.* } Case.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

This day came the said defendant by its attorney and presented and filed its petition for the transferring of said cause into the United States Circuit Court for the northern district of Illinois; and said defendant offering as security a bond in the penal sum of five hundred dollars, with Henry C. Wentworth as surety, conditioned that said defendant will enter into said Circuit Court of the United States on or before the first day of its next session copies of the process issued, pleadings filed, and of proceedings entered of record in said cause; and the court being fully satisfied with the surety offered, it is ordered that said cause be, and it hereby is, transferred to said United States Circuit Court for the northern district of Illinois, according to the act of Congress in such case made and provided.

42 STATE OF ILLINOIS, } *ss.*
Cook County,

I, Jacob Gross, clerk of the Circuit Court of Cook county and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all papers filed and proceedings had and entered of record in a certain cause lately pending in said court, on the common law side thereof, between Robert Hayes, a minor, by Geo. C. Fry, his next friend, plaintiff, and the Michigan Central R. R. Co., defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 12th day of December, 1879.

[SEAL.] JACOB GROSS,
Clerk.

Received eight $\frac{50}{100}$ dollars for copy.

JACOB GROSS,
Clerk.

(Endorsed:) Filed December 13th, 1879. W. H. Bradley, clerk.

Afterwards, to wit, on the thirty-first day of January, A. D.
43 1881, of the adjourned December term A. D. 1880, in said court, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

ROBERT HAYES, a minor, by GEORGE C. FRY. his next friend, *vs.* THE MICHIGAN CENTRAL RAILROAD COMPANY.	Case.

Now come the parties by their attorneys, and, upon issue joined herein, thereupon come a jury of good and lawful men, to wit, William C. Harrington, H. J. Farwell, Charles L. Smith, C. B. Johnson, Patrick Dooley, L. J. Cobb, Hiram P. Bartlett, O. A. Alford, John S. Russell, Frank Osborn, W. H. Johnson and Thomas N. Young, who were all duly elected, tried, and sworn well and truly to try said issue, and on motion of the plaintiff by his attorney it is ordered, that all claim for medical attendance and service set up in the declaration herein be stricken out; and, after hearing the evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-
44 morrow morning.

Afterwards, to wit, on the first day of February, A. D. 1881, of the adjourned December term A. D. 1880, in said court, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

ROBERT HAYES, a minor, by GEORGE C. FRY, his next friend, *vs.* THE MICHIGAN CENTRAL RAILROAD COMPANY.	Case.

Now come again the parties by their attorneys, and now come also the jury in this behalf empanelled and sworn, and, after hearing the concluding arguments of counsel, the court instructs the jury to return a verdict of not guilty against the defendant; and thereupon the jury return the following verdict, to wit: We, the jury, find the defendant not guilty. And the plaintiff by his attorney excepts to the instructions of the court to the jury, and moves the court for a new trial herein, and the court, being now sufficiently advised upon said motion, overrules the same and awards judgment.

45 It is thereupon considered and adjudged by the court that the defendant be discharged, and that it have and recover of the plaintiff its costs and charges about its defence in this behalf expended, amounting to the sum of forty-two dollars and twenty cents, and that it have execution therefor.

On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

46 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss.*

In the Circuit Court of the United States.

ROBERT HAYES, by GEORGE C. FRY, his next friend,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. }

Be it remembered that this cause coming on this 31st day of January, A. D. 1881, this day being one of the term days of the December term, A. D. 1880, of said court, to be heard before said court and a jury duly impanelled therein, the plaintiff, to maintain his issues, introduced evidence tending to prove the following facts, that is to say:

The ordinance passed by the common council of the city of Chicago, in the county of Cook and State of Illinois, on June 1~~4~~, A. D. 185~~6~~, 2 entitled "An ordinance concerning the Illinois Central Railroad."

AN ORDINANCE concerning the Illinois Central Railroad Company.

Be it ordained by the Common Council of the city of Chicago:

Permission to construct and maintain road within the city limits.

SEC. 1. That permission is hereby granted to the Illinois Central Railroad Company to lay down, construct, and maintain within the limits of the city of Chicago and along the margin of the lake within and adjacent to the same a railroad with one or more tracks, and to operate the same with locomotive engines and cars under such rules and regulations with reference to speed of trains, 47 the receipt, safe-keeping and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as said company may from time to time establish; and to have the right of way and all powers incident to and necessary therefor, in the manner and upon the terms and conditions following, to wit: The said road shall enter said city at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section fifteen, and continue northerly across the open space in front of said section fifteen to such ground as the said company may acquire between the north line of Randolph street and the Chicago River, in the Fort Dearborn addition to said city, upon which said grounds shall be located the depot of said railroad within the city and such other buildings, slips, or apparatus as may be necessary and convenient for the business of said company. But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way, or other right, privilege or easement, not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of said company.

Grant of right of way in perpetuity between Twelfth street and Randolph street on lake front.

SEC. 2. The said company may enter upon and use in perpetuity for its said line of road, and other works necessary to protect the same from the lake, a width of three hundred feet from the southern boundary of said public ground, near Twelfth street, to the northern line of Randolph street; the inner or west line
48 of the ground to be used by said company to be not less than four hundred feet east from the west line of Michigan avenue, and parallel thereto.

Power to extend works, and fill out into the lake between South Pier and Randolph street.

SEC. 3. The said company may extend their works and fill out into the lake to a point in the southern pier not less than four hundred feet west from the present east end of the same, thence parallel with Michigan avenue to the north line of Randolph street extended; but it is expressly understood that the common council does not grant any right or privilege beyond the limits above specified, nor beyond the line that may be actually occupied by the works of said company. It is further expressly understood, that should any damage or obstruction occur to the harbor of Chicago clearly traceable to the construction of said works contemplated by sections two and three hereof, then the said company shall be held responsible for the same.

Permission to construct and maintain track to south branch Chicago River and across same to Kinzie street.

SEC. 4. Permission and right of way are hereby given to the said company to construct and maintain a side track from its main track, beginning at or south of Twelfth street, proceeding through said street, or such line as may be prescribed by the common council, westerly to the south branch of the Chicago River; thence crossing the said south branch by a bridge, or other mode to be approved by the common council, which shall not obstruct navigation; thence proceeding north-
49 erly to Kinzie street, following as far as practicable the streets nearest to said branch, on such sides of the center of streets as the common council may prescribe; said track not to be laid west of the west line of Canal street; and also a track leading from the last mentioned track at or near its intersection with the eastern line of the said south branch of the Chicago River, along the line of said south branch into Market street, following as far as possible the streets nearest the river, and on such sides of such streets as the common council may direct; thence along the west line of Market street northerly to Lake street; and they may also extend the track of said road from their track or grounds south of the south pier, across the Chicago River to North Water street, by means of a draw-bridge, or other mode which shall not obstruct navigation, and may be approved by the common council.

And also to build bridge and lay track across the Chicago River to North Water street.

and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

46 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss.*

In the Circuit Court of the United States.

ROBERT HAYES, by GEORGE C. FRY, his next friend,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. }

Be it remembered that this cause coming on this 31st day of January, A. D. 1881, this day being one of the term days of the December term, A. D. 1880, of said court, to be heard before said court and a jury duly impanelled therein, the plaintiff, to maintain his issues, introduced evidence tending to prove the following facts, that is to say:

The ordinance passed by the common council of the city of Chicago, in the county of Cook and State of Illinois, on June 14 A. D. 185~~6~~, 2 entitled "An ordinance concerning the Illinois Central Railroad."

AN ORDINANCE concerning the Illinois Central Railroad Company.

Be it ordained by the Common Council of the city of Chicago:

Permission to construct and maintain road within the city limits.

SEC. 1. That permission is hereby granted to the Illinois Central Railroad Company to lay down, construct, and maintain within the limits of the city of Chicago and along the margin of the lake within and adjacent to the same a railroad with one or more tracks, and to operate the same with locomotive engines and cars under such rules and regulations with reference to speed of trains, 47 the receipt, safe-keeping and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as said company may from time to time establish; and to have the right of way and all powers incident to and necessary therefor, in the manner and upon the terms and conditions following, to wit: The said road shall enter said city at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section fifteen, and continue northerly across the open space in front of said section fifteen to such ground as the said company may acquire between the north line of Randolph street and the Chicago River, in the Fort Dearborn addition to said city, upon which said grounds shall be located the depot of said railroad within the city and such other buildings, slips, or apparatus as may be necessary and convenient for the business of said company. But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way, or other right, privilege or easement, not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of sai company.

Grant of right of way in perpetuity between Twelfth street and Randolph street on lake front.

SEC. 2. The said company may enter upon and use in perpetuity for its said line of road, and other works necessary to protect the same from the lake, a width of three hundred feet from the southern boundary of said public ground, near Twelfth street, to the northern line of Randolph street; the inner or west line
48 of the ground to be used by said company to be not less than four hundred feet east from the west line of Michigan avenue, and parallel thereto.

Power to extend works, and fill out into the lake between South Pier and Randolph street.

SEC. 3. The said company may extend their works and fill out into the lake to a point in the southern pier not less than four hundred feet west from the present east end of the same, thence parallel with Michigan avenue to the north line of Randolph street extended; but it is expressly understood that the common council does not grant any right or privilege beyond the limits above specified, nor beyond the line that may be actually occupied by the works of said company. It is further expressly understood, that should any damage or obstruction occur to the harbor of Chicago clearly traceable to the construction of said works contemplated by sections two and three hereof, then the said company shall be held responsible for the same.

Permission to construct and maintain track to south branch Chicago River and across same to Kinzie street.

And also to build bridge and lay track across the Chicago River to North Water street.

SEC. 4. Permission and right of way are hereby given to the said company to construct and maintain a side track from its main track, beginning at or south of Twelfth street, proceeding through said street, or such line as may be prescribed by the common council, westerly to the south branch of the Chicago River; thence crossing the said south branch by a bridge, or other mode to be approved by the common council, which shall not obstruct navigation; thence proceeding north-
49 erly to Kinzie street, following as far as practicable the streets nearest to said branch, on such sides of the center of streets as the common council may prescribe; said track not to be laid west of the west line of Canal street; and also a track leading from the last mentioned track at or near its intersection with the eastern line of the said south branch of the Chicago River, along the line of said south branch into Market street, following as far as possible the streets nearest the river, and on such sides of such streets as the common council may direct; thence along the west line of Market street northerly to Lake street; and they may also extend the track of said road from their track or grounds south of the south pier, across the Chicago River to North Water street, by means of a draw-bridge, or other mode which shall not obstruct navigation, and may be approved by the common council.

Tracks to be subject to city regulations. Side tracks to be open to use of other roads on fair terms.

SEC. 5. And the said side tracks shall be so constructed, furnished, and operated as to meet the demands of business upon the streets and lines through and along which they shall run. The said side tracks, stations, depots, turn-out, switches, turn-tables, buildings, and bridges along said lines, as well as the motive power to be used and the rate of speed thereon, to be subject to such regulations as the common council may from
50 time to time prescribe for the government of side tracks of railroads within the inhabited portions of the city; said side tracks shall be open to the use of other railroad companies and railroads connecting therewith, upon just and equitable terms, to be agreed upon by the parties interested, and in case of disagreement, by arbitration.

Company to construct fences and gates on the western line of right of way on lake shore.

SEC. 6. The said company shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls, fences, or other sufficient works as will prevent animals from straying upon or obstructing its tracks and secure persons and property from danger, said structure to be of suitable materials and sightly appearance, and of such height as the common council may direct, and no change therein shall be made except by mutual consent; provided, however, that the company shall construct such suitable gates at proper places, at the ends of the streets which are now or may hereafter be laid out, as may be required by the common council, to afford safe access to the lake; and provided, also, that in case of the construction of an outside harbor, streets may be laid out to approach the same, in the manner provided by law, in which case the common council may regulate the speed of locomotives and trains across them.

And to erect a continuous breakwater from Randolph street to south of Lake Park.

51 SEC. 7. The said company shall erect and complete within three years after they shall have accepted this ordinance, and shall forever thereafter maintain, a continuous wall or structure of stone masonry pier work or other sufficient material, or regular and sightly appearance, and to exceed in height the general level of Michigan avenue, opposite thereto, from the north side of Randolph street to the southern bound of Lake Park before mentioned, at a distance of not more than three hundred feet east from and parallel with the western or inner line pointed out for said company, as specified in section two thereof, and shall continue said works to the southern boundary of the city, at such distance outside of the track of said road as may be expedient, which structure and works shall be of sufficient strength and magnitude to protect the entire front of said city between the north line of Randolph street and its southern boundary from further damage or injury from the action of the waters of Lake Michigan, and that part of the

structure south of Lake Park shall be commenced and prosecuted with all reasonable dispatch after the acceptance of this ordinance.

Company not to occupy or use Lake Park.

SEC. 8. The said company shall not in any manner, nor for any purpose whatever, occupy, use, or intrude upon the open ground known as Lake Park, belonging to the city of Chicago, lying between Michigan avenue and the western or inner line before mentioned, 52 except so far as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground.

And shall not erect buildings between Randolph street and the south line of Lake Park, or permit cars to stand.

SEC. 9. The said company shall erect no buildings between the north line of Randolph street and the south line of the said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains; nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives, cars, or other articles to remain upon their tracks; but only erect such works as are proper for the construction of their necessary tracks and protection of the same.

And shall make and keep open culverts for the flow of water.

SEC. 10. The said company in constructing their said line of works in front of Lake Park and the public grounds shall make and keep open through the same such culverts or ways as the common council shall prescribe, from the open lake to the space inside of the western line before mentioned, as will afford room for the uninterrupted flow of the water through the same.

Company to lay down track from Twelfth street if the city provide right of way.

SEC. 11. The said company shall lay down, construct, operate, and maintain a track with suitable turn-outs, switches, and turn-tables through Twelfth street, or through such other street north of North street as the common council may designate, from their main track on the lake shore, to connect with the said tracks to be constructed by the Chicago and Rock Island Railroad Company, or procure the same to be done, as provided by an ordinance 53 of the city of Chicago, passed April 2, 1852, so soon as the said track on the east side of the south branch of the river shall be completed; provided that the city of Chicago shall furnish the right of way to the said company free of cost before requiring said track to be constructed.

An acceptance of ordinance contract to be made.

SEC. 12. Upon the acceptance of this ordinance by the said company, (which shall be within ninety days of the passing of the same,) a contract or agreement embodying the provisions herein contained, and stipulating that the permission, rights, and privileges hereby conferred upon said company shall depend upon the performance on their part of the requirements made upon them by this ordinance, shall be executed, sealed, and delivered on the part of the city of Chicago by the mayor thereof, and on the part of the Illinois Central Railroad Company by the president thereof, both in usual legal form.

THE CONTRACT OF ACCEPTANCE OF SAID ORDINANCE BY SAID ILLINOIS CENTRAL RAILROAD COMPANY.

Agreement and Ordinance granting right of way into the city of Chicago to Illinois Central Railroad Co.

(Ordinance adopted 14 June, 1852.)
(Agreement dated 28 March, 1853.)

54 Agreement between the Common Council of the city of Chicago and the Illinois Central Railroad Company.

To all to whom these presents shall come, greeting:

Recites passing of ordinance of 14th June, 1852.

Whereas the common council of the city of Chicago, in the State of Illinois, under and by authority conferred by the laws of said State and the charter of said city, did on the 14th day of June, in the year of our Lord one thousand eight hundred and fifty-two, pass and adopt in due and legal manner and form "An ordinance concerning the Illinois Central Railroad," in the words and figures hereinafter set forth or mentioned, as by reference to said ordinance or a copy thereof hereinafter contained, reference being had thereto, will more fully and at large appear.

And proceedings of I. C. R. R. board accepting same.

And whereas, at a meeting of the board of directors of the said Illinois Central Railroad Company, held at the office of said company in the city of New York on the second day of September, in the year of our Lord one thousand eight hundred and fifty-two, in accordance with the several provisions of the charter and by-laws of said company, the following proceedings were had, as appears by reference to the records of said company kept at their said office, that is to say: "The president submitted a certified copy of the resolution of the common council of Chicago, passed on the 14th day of June, 1852, granting permission to the Illinois Central Railroad Company to lay down, construct, and maintain within the limits of the city of Chicago and along the margin of the lake within and adjacent 55 to the same a railroad with one or more tracks, and to operate the same with locomotive engines and cars, under certain rules and regulations, as follows:

(See ordinance on page 46.)

The resolutions were read to the board and separately considered, whereupon it was, on motion—

Resolution of board accepting ordinance.

Resolved, That the Illinois Central Railroad Company do hereby accept the ordinance of the common council of the city of Chicago, passed on the 14th day of June, 1852, and the officers of the company are hereby directed and empowered to prepare and duly execute, under the corporate seal of this corporation, the agreement or contract necessary for the proper execution of the provisions of the ordinance above named and of the plans of this company, as authorized on the part of the city of Chicago, by the 12th section of the said ordinance.

On motion—

Resolved, That the Chicago location substantially as described in the ordinance of the common council of Chicago be adopted, approved, and confirmed, and that the necessary maps, drawings, and descriptions be prepared by the chief engineer and duly certified by him and the other officers of the company, in order to file and record the same in the manner prescribed by law. 56

Adoption of location through Chicago.

Now know ye that this agreement, made and concluded this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and fifty-three, by and between the common council of the city of Chicago, in the State of Illinois, of the first part, and the Illinois Central Railroad Company, a corporation created by an act of the Legislature of the State of Illinois, of the second part, witnesseth: That in consideration of the acceptance of the said ordinance, according to the terms and requirements thereof, as hereinbefore recited or set forth, and of the agreements and matters herein contained, all and singular the permission, grants, conveyances, rights, privileges, easements, immunities, possession, franchises, exemptions, releases, and benefits given and granted, or intended to be given and granted, by virtue of and according to the true intent and meaning of the said ordinance hereinbefore recited and set forth and made part of this agreement, are hereby confirmed and ratified and made forever binding upon the said city of Chicago, subject to the conditions and provisions in said ordinance contained and made part and parcel of this agreement.

Confirmation by city of Chicago of ordinance by agreement.

And this indenture further witnesseth: That for and in consideration of the consent, grants, covenants, and agreements on the part of the said city of Chicago as aforesaid, made, entered into, and concluded, 57 and herein ratified and confirmed, the said Illinois Central Railroad Company do hereby covenant and agree to and with the said city of Chicago and the common council thereof that they do and will ratify and confirm all and singular the provisions, stipulations, covenants, and agreements in said ordinance, and the said acceptance thereof, contained or provided for, and on their part to do and perform, according to the true intent and meaning thereof, all the things required to be done by the terms of said ordinance, upon the acceptance thereof, in manner and form and at the times and on the conditions and subject to the reservations and forfeitures therein contained, it being stipulated and agreed that the permission, rights, and privileges conferred upon said party of the second part by said ordinance and herein confirmed shall depend upon the per-

Covenant by I. C. R. R. to perform all conditions.

formance on the part of the said party of the second part of the requirements made upon them by said ordinance as herein recited, set forth, ratified, and confirmed. And the said parties do hereby mutually and severally declare and affirm this agreement to be made in accordance with the terms of said ordinance, and the acceptance thereof as above recited and set forth, and for the purpose of confirming, ratifying, and establishing the same as of binding and perpetual obligation between said contracting parties, hereby agreeing and covenanting, each with the other, to stand to, abide by, and 58 to do and perform all the obligations therein contained according to the true intent, meaning, and interpretation thereof forever, subject to the limitations, restrictions, and forfeitures therein contained.

Agreement to be of binding and perpetual obligation.

In witness whereof, the common council of the city of Chicago, in behalf of said city of Chicago, party of the first part, have caused their corporate seal to be hereto affixed, and these presents to be signed by Charles M. Gray, the mayor of said city; and the Illinois Central Railroad Company, the said party of the second part, have caused their corporate seal to be hereunto affixed, and these presents to be signed by Robert Schuyler, their president, the day and year last above written.

[Seal of the city of Chicago.] CHARLES M. GRAY,
Mayor of the City of Chicago.

Attest: H. W. ZIMMERMAN, *City Clerk.*

[Seal of the Illinois Central R. R. Co.] THE ILLINOIS CENTRAL R. R. CO.,
by ROBERT SCHUYLER, *President.*

Sealed and delivered in the presence of—
S. ALOFSEN.
MOSES B. MACLAY.

STATE OF NEW YORK, } ss.
City and County of New York,

I, Moses B. Maclay, of said city, a commissioner of the State of Illinois in the city and State of New York to take depositions, 59 acknowledgments of deeds, etc., to be used or recorded in the State of Illinois, duly commissioned by his excellency the governor thereof, and qualified, do hereby certify that on this twenty-eighth day of March, in the year 1853, before me, in the said city of New York, came Robert Schuyler, the president of the Illinois Central Railroad Company, with whom I am personally acquainted, and who being by me duly sworn, deposes and says that he resides in the city of New York; that he is the president of the Illinois Central Railroad Company; that the seal affixed to the within agreement is the corporate seal of the president, directors and company of the said railroad company, and was affixed to the said agreement by order of said directors for the uses therein expressed, and that he, by like order, did subscribe his name thereto as president of the said Illinois Central Railroad Company.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office as such commissioner, at my office in the city of New York, the said twenty-eighth day of March, A. D. 1853.

[SEAL.] MOSES B. MACLAY,
Illinois Commissioner in the City of New York.

That the open space known as the Lake Park is a vacant piece of land in said city of Chicago, lying along the shore of Lake
60 Michigan and running from Park row on the south to Randolph street on the north, and from Michigan avenue on the west to the west line of the right of way of the Illinois Central Railroad Company on the east, as shown by the plat hereto annexed, marked "Exhibit A," and made a part of this bill of exceptions.

That east of and adjoining said Lake Park is the right of way of said I. C. R. R. Co.

The distance across said Lake Park from Michigan avenue to the right of way of the Illinois Central R. R. Co. is 280 feet. That east of said park at the place of accident to plaintiff, and a distance of 27 feet from said park, are and were at the time of said accident 4 tracks of said Illinois Central Railroad Company running north and south, and that at the distance of about 200 feet east of said park is the breakwater of said Illinois Central Railroad Company, on the shore of said lake.

That at the time of the passage of said ordinance and of the laying of said tracks a large portion of said open space was open water, there being only a small strip of ground along Michigan avenue, with an interval of open water between the shore line and the railroad tracks of from 200 to 300 feet, known as the "Basin." That said railroad tracks from Park row north to Randolph street were laid on piles driven in the water and standing in the open lake, and that said breakwater was built outside and east of said tracks,
61 and also in the open lake, at a distance of 200 feet east of the west line of the right of way of the Illinois Central Railroad, as defined in said ordinance; and that said open space remained in substantially that condition up to about the time of the great fire of October 9th, 1871, except the southwest corner, which was filled up for about 100 feet from Park row, the tracks still being on piles in the open water.

That after said fire the said park was gradually filled up from the ruins of said fire. That about two years previous to the accident that part of the open space called the Lake Park, north of Peck court, was filled up. That the last part filled up was between Harmon court and Peck court. That that part of the park near the place of the accident was being filled up the winter of the year previous to the accident, and was pretty well filled up the spring of that year. That at the time of the accident said open space was all filled up

west of and under the tracks. That east of the tracks it was filled up irregularly between the tracks and the breakwater, the water being close to the tracks in some places, and stones being thrown in to keep the water from washing away the dirt. That it was filled up sufficiently in some places to allow people to get out to the breakwater. That north of Peck court it was pretty well filled in, but south of that street it was not filled in well; and that at
62 Peck court there was a roadway across the park and tracks used by wagons hauling materials used in filling up the open space. That the said tracks of said Illinois Central Railroad Company were originally built upon piling or piles in the water east of said park, extending the entire length of said park, and so remained in said water until the space underneath them was filled in as aforesaid.

That said breakwater was erected by said Illinois Central Railroad Company about the same time that the said tracks were built upon said piles.

That the said railroad tracks were also used, with the consent or license of said Illinois Central Railroad Company, by the Chicago, Burlington & Quincy Railroad Company; Baltimore & Ohio Railroad Company; the Cincinnati, Lafayette & Chicago Railroad Company, and the defendant, for the period of five years and upwards prior to said March 17th, 1878.

That said tracks were also used by other roads in said city for the purpose of transferring freight to and from the yards near Randolph street. That trains and locomotives were passing along said tracks very frequently, almost constantly.

That said park was a public park free to all who might go thereon, and frequented by children and others as a place of resort for recreation, especially on Sundays. That on said park, at a place marked "A" on the plat, was a band-house for free open-air concerts. That in the summer time especially great numbers or crowds of
63 people went on said park and across said tracks, and to the breakwater beyond for the purpose of fishing and other amusements and recreation. That at Harrison street and also at Van Buren street they used to cross over the track from the park to ferry-boats. That at Peck court, where teams crossed the track, there was a flagman, and a great many people used to cross there and get on the breakwater.

That from Park row north to about a point marked "b" on the plat, and being about east of the north line of Harmon court, was a common five-board fence erected by said Illinois Central Railroad Company along the western line of its right of way in 1872.

That at the time of the injury the north end of said fence was broken down, and the rest of it was in good order; that said fence did not prevent people from getting to the breakwater; that opposite to the same there was water between the track and the breakwater; that at that point they would climb over the fence and go down the track to a point where they could get on the breakwater;

that neither the Illinois Central Railroad Company nor any of the railroad companies using said tracks had taken any steps or precautions to keep off or prevent persons on said park from going on said tracks or across the same to the open water or breakwater beyond said tracks, other than as stated herein.

64 Prior to the year 1878 a fence had been built from city limits north to Lake Park, partly by the Illinois Central Railroad Company and partly by private parties; that that part of said fence built by the Illinois Central Railroad Company south of Park row to Weldon, which is north of the city limits, was built in 1872.

That plaintiff's father lived at the time of the accident on the third floor of a tenement building on the corner of 4th avenue and Van Buren street, four blocks west of said park; that plaintiff's father was a plasterer, and was called by his business away from his home during the week; that plaintiff's mother also went out to work from time to time.

That across the street from where plaintiff's parents lived there was a vacant lot where children in the neighborhood frequently played; that on the 17th of March, 1878, that being the day that plaintiff was injured, as hereinafter stated, plaintiff was about 8 years and 9 months of age; that when plaintiff was about two and one-half years of age he became sick with the cerebro spinal meningitis, and from the effects of that disease he became deaf and dumb, and has ever since so continued to be; that although the parents endeavored to place him in institutions for such persons the authorities refused to receive him, as he was too young. His parents began to teach the plaintiff the sign language—using both hands—a couple of months before he sustained his injury.

65 That the plaintiff was born in Chicago, and since his birth had always lived in said city; and that plaintiff was apparently a bright and, for his age, a well-grown boy at the time of the trial, except that he continued to be deaf and dumb; that plaintiff had an older brother, James, about two years his senior; that plaintiff's parents never permitted plaintiff to go out upon the streets unless in their care, or in the care of his elder brother James; and that plaintiff's parents had always had some one in charge of him when he went out.

That said 17th day of March, 1878, was on Sunday, and that on said day, in the morning, plaintiff's father went out and came back after noon; that there was a large procession of Catholic societies on that day, St. Patrick's day; that upon the return of the plaintiff's father his children desired to go out to see the procession, and plaintiff's father waited until he could see indications of it from his window, when he sent the plaintiff and his brother James out together to the corner of Wabash avenue and Van Buren street, 3 squares east of plaintiff's house, and on which avenue the procession was passing north; plaintiff's father told James to take care of him and not to leave him, and not to leave the corner of Van Buren street and Wabash avenue; and plaintiff and his brother returned home after the procession had passed by, and then they had dinner with their parents; they had dinner between 3 and 4 o'clock in the afternoon on that Sunday; that after dinner was over the children wanted to go out to play; plaintiff was given permission by his father 66 to go out and play under the charge of his brother James, the father sending the elder brother because he was afraid that parts of the procession might pass that way and that he might follow them up; they went across the street to the vacant lot; that some time after the children had gone out, plaintiff's parents desired to go out, and while they were preparing to do so, and before they had left the house, the older boy James came in alone; then his father asked him where the plaintiff was; James said he had found some money, and had gone in the candy store; there was a candy store on the first floor of the building where plaintiff's parents lived; plaintiff's father then told James to go and get his brother and bring him in, and both of them stay in the house until his parents came back; that this was a little before dusk, and his parents then went away, and did not return until a little after dark, when they found that the plaintiff was not at home; they searched in the neighborhood for him, and not finding him went to the police station, where they got word that a boy was hurt on the Illinois Central Railroad track, and found the plaintiff at the Sisters of Mercy Hospital with his arm off.

That plaintiff and several other boys were playing in the vacant lot near plaintiff's house, where a portion of the procession, after it had broken up, passed by where the boys were playing, and plaintiff, together with several other boys, but without his brother, followed the procession east on Van Buren street to Michigan avenue, 67 and south on Michigan avenue to about 12th st., when the plaintiff and the other boys returned, going north to the Lake Park, and that it was before dark when they went there.

That there the plaintiff and the other boys played "tag;" that they were there about 15 minutes.

That one of the boys who was with him testified that he saw the plaintiff before the accident over on the railroad tracks of the Illinois Central Railroad Company, northeast of the band-house, scraping his foot and looking down on the ground; that there was a train passing at the time, and that when he next saw the plaintiff, about a minute or two minutes after, he was lying on the ground, when he and the other boys ran away home.

That witness White, who was going north along and on the west side of said tracks, when at a place opposite Peck court, at about the place marked "d" on said plat, saw a Michigan Central freight train "coming in," that is, going north. That White turned around, and while looking at the train he saw plaintiff on the tracks near the place marked "c" on the plat, about opposite the foot of Eldridge court. He also saw a colored boy on the ladder on the side of one of the cars of the train, motioning as if he wanted plaintiff to come

along. That plaintiff started to run, and that just as he started to run north beside the train he turned and fell at the place marked "c" on the plat, and one or more wheels of the train passed
68 over plaintiff's arm. That at the place of the accident there were 4 tracks, and the accident occurred on the third track from the park. That when White saw the boy the engine of the train was a little past him (White), and the boy was running along by the car about a block away from him. That he (the plaintiff) got caught as he was running. That he started to run, and the witness supposed the draft of the train or something twisted him around and drew him under. That the plaintiff had his hands reached out towards the car, as if he was reaching after it. That the other boy, who was motioning him, was on the ladder on the side of the car (a box car) motioning the plaintiff to come along with him. And then the witness saw him drawn around (by the draft of the train as he supposed) and fall on his back by the train.

White with others went and got him up, and took him to a bench in the park, and from thence plaintiff was taken to the hospital, where he was found by his parents at about 8 o'clock the same evening; this accident occurred about 5 o'clock in the afternoon; and that amputation of plaintiff's arm was rendered necessary by his said injury, and plaintiff's left arm was amputated at his shoulder.

69 The defendant, to maintain the issues on its part, introduced testimony tending to prove the following:

An ordinance passed by said common council, September 10, 1855. and the acceptance thereof by said Illinois Central Railroad Company,

Also an ordinance adopted September 15th, 1856.

Ordinance

Granting additional right of way for approach to passenger depot, and acceptance thereof by Illinois Central Railroad Company.

(Adopted, 10 September, 1855.)

Whereas it has become necessary for the Illinois Central Railroad Company, in order to approach its passenger house, to curve its tracks westwardly of the line for the track fixed by the ordinance of June 14th, 1852, by crossing said line south of Randolph street extended, and proceeding northwesterly to its said passenger house; and

Whereas the said company has presented to this council a petition, accompanied by a map of its depot grounds, showing the tracks and curves as proposed to be made; therefore

Permission to curve tracks so as to obtain an approach to the depot.

Resolved, That permission be and the same is hereby granted to said company to curve its tracks westwardly of the line fixed by said ordinance so as to cross said line at a point not more than two hundred feet south of Randolph street, extending and curving said tracks northwesterly as they approach the depot, and crossing the north line of Randolph street extended at a point not more than one

hundred feet west of the line fixed by the ordinance afore-
70 said, in accordance with the map or plat thereof submitted by
said company and placed on file for reference.

Upon the following conditions, however:

On condition: 1. Company to lay out Central avenue.

First. That the said company shall lay out upon its own land, west of and alongside its passenger house, a street fifty feet wide, extending from Water street to Randolph street, and fill the same up its entire length within two years from the passage of this resolution.

2. Company to be limited south of Randolph street, as provided by Ordinance of 1852.

Second. That said company shall be restricted in the use of said tracks south of the north line of Randolph street, precisely as is provided by said ordinance of June 14th, 1852, relative to the main and side tracks, and shall permit no cars to stand thereon, except as in said ordinance provided.

3. Shall fill up all the space between its tracks and the lake shore.

Third. When the said company shall fill up under its said tracks south of the north line of Randolph street down to the point where said curves and side tracks commence, and the city shall grant its permission so to fill up its tracks, it shall also fill up at the same time and to an equal height all the space between the track so filled up and the lake shore, as it now exists, from the north side of Randolph street down to the point where said curves and side tracks intersect the line fixed by the ordinance aforesaid.

4. Company to accept terms.

Fourth. That the said company shall file with the city clerk its acceptance of the terms of this resolution, and its agreement to abide by and per-
71 form the said conditions before it shall construct said tracks.

Such acceptance to be under the corporate seal of said company and the signature of the president thereof.

Acceptance.

OFFICE OF THE ILLINOIS CENTRAL RAILROAD COMPANY,
CITY OF CHICAGO, *September* 11, 1855.

Acceptance of last Ordinance.

The Illinois Central Railroad Company does hereby accept of the terms of a resolution passed by the common council of the city of Chicago, on the 10th day of September, 1855, whereby permission is given to said company to curve its tracks westwardly of the line fixed by the ordinance of June 14th, 1852, so as to cross said line at a point not more than two hundred feet south of Randolph street, extending and curving said tracks northwesterly as they approach the depot, and crossing the north line of Randolph street extended at a point not more than one hundred feet west of the line fixed by the ordinance aforesaid, in accordance with the map or plan thereof submitted by said company and placed on file for reference. And the said company agrees to abide by and perform all the conditions set forth in or annexed to said resolution at the time and in the manner therein set forth.

In witness whereof, and in accordance with one of said conditions, the said company has caused this acceptance and agreement
72 to be made under its corporate seal and this signature of its president.

[SEAL.] J. N. A. GRISWOLD.
President.

Ordinance

Granting additional right of way to the Illinois Central Railroad Company. (Adopted 15 Sept., 1856.)

AN ORDINANCE concerning the Illinois Central Railroad.

Whereas the common council of this city, by an ordinance of the 14th day of June, 1852, granted to the Illinois Central Railroad Company the right to enter and use in perpetuity for its line of railroad and other works necessary to protect the same from the lake, a width of three hundred feet from the southern boundary of the public ground on Twelfth street to the northern line of Randolph street, the inner or the west line of which ground so to be used by the company to be not less than four hundred feet east from the west line of Michigan avenue and parallel thereto; and

Whereas the ground thus granted is shown to be too narrow to afford to said company a convenient means of approaching and using a part of their station grounds between Randolph street and Chicago River; therefore

Permission to occupy space east of existing right of way between river and Randolph street.

Be it ordained by the common council of the city of Chicago, That permission is hereby granted to the said Illinois Central Railroad Company to enter upon and use in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its present breakwater and a line
73 drawn from a point on said breakwater, seven hundred feet south of the north line of Randolph street extended, and running thence on a straight line to the southeast corner of its present breakwater, and thence to the river. Provided, however, and this permission is only given upon the express condition that the portion of said line which lies south of the north line of Randolph street extended shall be kept subject to all the conditions and restrictions, as to the use of the same, as are imposed upon that part of said line by the said ordinance of June 14. 1852.

Passed September 15th, 1856.

Approved: THOS. DYER, *Mayor.*
Attest: H. W. ZIMMERMAN, *Clerk.*

Also the charter of the city of Chicago in force June 15, 1852.

It being stipulated that the following sections of said charter are all that is material to the issues:

4. The common council shall have the management and control of the finances and all property—real, personal, and mixed—belong-

ing to the corporation, and shall likewise have power within the jurisdiction of the city by ordinance.

Thirtieth. To have exclusive power over the streets and
74 alleys, and to remove and abate any obstructions and encroachments therein.

Forty-fourth. To create and regulate the police of said city.

Forty-ninth. To regulate and prohibit the use of locomotive engines within the city, and may require the cars to be used thereon within the inhabited portions thereof to be drawn or propelled by other power than that of steam; to direct and control the location of railroad tracks and depot grounds, and prohibit railroad companies from doing storage and warehouse business, or collecting pay for storage.

Fifty-fourth. To exclusively control, regulate, repair, amend, and clear the streets and alleys, bridges, side and cross walks, and open, widen, straighten, and vacate streets and alleys, and put drains and sewers therein, and prevent the encumbering of the streets in any manner, and protect the same from any encroachment and injury.

Fifty-seventh. To fill up, drain, cleanse, alter, relay, repair, and regulate any grounds, yards, basins, slips, cellars, private drains, sinks, and privies, direct and regulate their construction, and cause the expenses thereof to be assessed and collected in the same manner as sidewalk assessments.

Fifty-ninth. To abate all nuisances which are or may be injurious to the public health, in any manner they may deem expedient.

Sixtieth. To do all acts and make all regulations which may be necessary or expedient for the preservation of health and the
75 suppression of disease.

Sixty-second. The common council shall have power to make, publish, ordain, amend, and repeal all such ordinances or by-laws and police regulations not contrary to the constitution of this State, for the good government and order of the city and the trade and commerce thereof, as may be necessary or expedient to carry into effect the powers vested in the common council, or any officer of said city, by this act; and enforce observance of all rules, ordinances, by-laws, and police and other regulations, made in pursuance of this act, by penalties not exceeding one hundred dollars for any offense against the same. The common council may also enforce such rules, ordinances, by-laws and police and other regulations as aforesaid by punishment of fine or imprisonment, or both, in the county jail, Bridewell, or house of correction, in the discretion of the magistrate or court before which conviction may be had; provided such fine shall not exceed five hundred dollars nor the imprisonment six months.

Which was all the evidence offered in said cause.

The court thereupon, and against the plaintiff's objection, instructed the jury impanelled in said cause to find a verdict for the defendant therein; to which action and ruling of the court the plaintiff by his attorneys then and there duly excepted.

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75 Sixtieth. To do all acts and make all regulations which may be necessary or expedient for the preservation of health and the suppression of disease.

Sixty-second. The common council shall have power to make, publish, ordain, amend, and repeal all such ordinances or by-laws and police regulations not contrary to the constitution of this State, for the good government and order of the city and the trade and commerce thereof, as may be necessary or expedient to carry into effect the powers vested in the common council, or any officer of said city, by this act; and enforce observance of all rules, ordinances, by-laws, and police and other regulations, made in pursuance of this act, by penalties not exceeding one hundred dollars for any offense against the same. The common council may also enforce such rules, ordinances, by-laws and police and other regulations as aforesaid by punishment of fine or imprisonment, or both, in the county jail, Bridewell, or house of correction, in the discretion of the magistrate or court before which conviction may be had; provided such fine shall not exceed five hundred dollars nor the imprisonment six months.

Which was all the evidence offered in said cause.

The court thereupon, and against the plaintiff's objection, instructed the jury impanelled in said cause to find a verdict for the defendant therein; to which action and ruling of the court the plaintiff by his attorneys then and there duly excepted.

76 And thereupon the jury rendered their verdict, finding the defendant not guilty.

The plaintiff thereupon entered a motion for a new trial in said cause, assigning as reason therefor:

1st. That the court erred in refusing to allow said cause to go to the jury impanelled therein.

2nd. That the court erred in directing said jury to return a verdict in favor of the defendant.

3rd. That the verdict is contrary to the evidence in the case.

4th. That the verdict is contrary to the law of the case.

5th. That the verdict is contrary to the law and the evidence in the case.

Thereupon the court overruled plaintiff's motion for a new trial, and caused judgment to be entered on the verdict for defendant; to which ruling of the court the plaintiff then and there duly excepted.

Therefore, inasmuch as the aforesaid matters and things do not appear from or in the record of said suit, the plaintiff prays that this may be made his bill of exceptions, and that the same be duly signed and sealed and incorporated in the record of said cause.

Which is accordingly hereby done.

H. W. BLODGETT,
Judge.

[Here follows diagram, marked page 77.]

78 (Endorsed:) Filed Feb'y 1, 1881. Wm. H. Bradley, clerk.

Afterwards, to wit, on the seventh day of May, A. D. 1881, there was filed in said clerk's office the bond on writ of error in said entitled cause, which said bond is in the words and figures following, to wit:

Bond on Writ of Error.

Supreme Court of the United States, of the October term, A. D. 1881.

ROBERT HAYES, a minor, by GEORGE C. FRY, his next friend, plaintiff in error,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, defendant in error.

Know all men by these presents, that we, George C. Fry, James Hays, and Joseph W. Merriam, of Cook county, Illinois, are held and firmly bound unto the said Michigan Central Railway Company in the penal sum of five hundred dollars, to be paid to the said Michigan Central Railway Company, its successor or successors, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

79 Sealed with our seals and dated this sixth day of May, A. D. 1881.

Whereas Robert Hayes, a minor, who sues by the above named George C. Fry, his next friend, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Circuit Court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the said Robert Hayes, by George C. Fry, his next friend, as aforesaid, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE C. FRY. [SEAL.]
JAMES JOHN HAYES. [SEAL.]
JOSEPH W. MERRIAM. [SEAL.]

Sealed and delivered in presence of—
JNO. H. WHIPPLE.

Approved: H. W. BLODGETT, *Judge.*

(Endorsed:) Filed May 7th, 1881. Wm. H. Bradley, clerk.

80 NORTHERN DISTRICT OF ILLINOIS, *ss.*

I, William H. Bradley, clerk of the Circuit Court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein Robert Hayes, a minor, by George C. Fry, his next friend, is the plaintiff, and the Michigan Central Railroad Company is the defendant, as appears from the records of said court, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at my office in Chicago, in said district, this seventh day of May, A. D. 1881.

[SEAL.] WM. H. BRADLEY,
Clerk.

81 UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss.*

The United States of America to the Judges of the Circuit Court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said Circuit Court between Robert Hayes, a minor, by George C. Fry, his next friend, plaintiff, and the Michigan Central Railroad Company, defendant, in an action of trespass on the case, a manifest error hath happened, to the great damage of the said Robert Hayes, a minor, by George

C. Fry, his next friend, plaintiff, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1881, in the Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States, this fifth day of February, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 105th year.

[SEAL.] WM. H. BRADLEY,
Clerk of Circuit Court of the United States for
Northern District of Illinois.

82 UNITED STATES OF AMERICA, } *ss.*
Northern District of Illinois, }

To the Michigan Central Railway Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1881, pursuant to an writ of error issued out of the office of the clerk of the Circuit Court of the United States in and for the northern district of Illinois, filed in the clerk's office of the Circuit Court of the United States for the northern district of Illinois, wherein Robert Hayes, a minor, by George C. Fry, his next friend, is the plaintiff in error, and the Michigan Central Railway Company is the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, presiding judge of said court on the trial of said cause, this 7th day of May, in the year of our Lord one thousand eight hundred and eighty-one.

H. W. BLODGETT,
Judge.

83 Received copy of the within citation this 7th day of May, 1881.

DEXTER, HERRICK & ALLEN,
Att'ys for Def't.

(Endorsed:) Supreme Court of the United States. Robert Hayes, a minor, etc., *vs.* The Michigan Central Railway Company. Citation to October term, A. D. 1881.

(Endorsement on cover:) N. Illinois, C. C. U. S.; No. 263. Robert Hayes, a minor, by George C. Fry, his next friend, pl'ff in error, *vs.* The Michigan Central Railway Company. Filed 18th July, 1881.

111-228

OFFICE SUPREME COURT U.S.
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— IN THE —

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1883.

ROBERT HAYES, a minor, by GEORGE C. FRY, his next friend

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

In error to the Circuit Court of the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

A. D. RICH.
GEORGE C. FRY.
J. W. MERRIAM.

Attorneys for Plaintiff in Error.

S. W. ROTH, LEGAL PRINTER, 171 & 173 RANDOLPH ST.,
CHICAGO.
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SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1883.

ROBERT HAYES A MINOR, BY GEORGE C. FRY, HIS NEXT FRIEND.

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

In error to the
Circuit Court of the
Northern District
of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF FACTS.

This was an action on the case brought by the plaintiff in error against the defendant in error for damages for personal injuries sustained on the 17th day of March, 1878, by reason of a portion of a train of cars of the defendant running over plaintiff's left arm, whereby it became necessary to amputate the same at the shoulder.

The plaintiff was about 8 years and 9 months old. When about two and a half years old he was rendered deaf and dumb by an attack of *Cerebro-Spinal Meningitis*, and has since so continued.

For a couple of months before the injury his parents had endeavored to teach him the sign language using both hands. They had tried before that time to get him into a deaf and dumb school but he was pronounced too young.

The plaintiff's father was a plasterer, and lived with his family on the 3rd floor of a tenement building, on the corner of 4th Avenue and Van Buren streets, four blocks West of "The Lake Park," in the City of Chicago.

The plaintiff's mother went out to work, by day work, from time to time, and the father was away from home constantly during working hours. The plaintiff had a brother James about two years his senior, about 12 years old, and was never permitted by his parents to go upon the streets unless in their own care or under the care of his brother James. On the day in question, it being Sunday and St. Patrick's day, there was a large procession of Catholic Societies on the streets; and afternoon the children wanted to go out and see the procession; permission was given to them and they returned in time for dinner which they had between the hours of 3 and 4 o'clock.

Across the street from the tenement house, where the plaintifl's parents lived, there was a vacant lot, used as a play ground by the children in the neighborhood.

After dinner was over the children wanted to go out to play; and plaintiff was given permission, by his father, to go out and play under the charge of his brother James, as usual. They went across the street to the vacant lot. Some time after the children had gone out, plaintifl's parents desired to go out, and while they were preparing to do so, and before they had left the house, the older boy James came in alone, his father asked him where het plaintiff was; James said he had found some money, and had gone in the candy store. There was a candy store on the first floor of the building where plaintiff's parents lived. His father then told James to go and get his brother and bring him in, and both of them stay in the house until they came back. This was a little before dusk. His parents then went away, and did not return until a little after dark, when they found that the plaintiff was not at home. They searched in the neighborhood for him, and not finding him, went to the police station, where they got word that a boy was hurt on the Illinois Central Railroad track, and found the plaintiff at the Sisters of Mercy Hospital with his arm off.

Plaintiff and several other boys were playing in the vacant lot, when a portion of the procession, after it had broken up, passed by where the boys were, and plaintiff, together with several other boys, but without his brother, followed the procession east on Van Buren street to Michigan avenue, and south on Michigan avenue to about 12th St., when the plaintiff and the other boys returned, going north to the Lake Park. It was before dark when they went there.

There the plaintiff and the other boys played "tag" for about 15 minutes.

One of the boys who was with him testified that he saw the plaintiff before the accident over on the railroad tracks, northeast of the band-house, scraping his foot and looking down on the ground; that there was a train passing at the time, and that when he next saw the plaintiff, about a minute after, he was lying on the ground, when he, witness, and the other boys ran away home.

Witness White, who was going north along and on the west side of said tracks, testified that when at a place opposite Peck court, at about the place marked "d" on the plat (Rec. 22) he saw a Michigan Central freight train "coming in," that is, going north. White turned around, and while looking at the train, saw plaintiff on the tracks near the place marked "c" on the plat, about opposite the foot of Eldridge court. He also saw a colored boy on the ladder of one of the cars, motioning as if he wanted plaintiff to come along. Plaintiff started to run north beside the train, just as he started he turned and fell at the place marked "c" on the plat; and one or more wheels of the train passed over his arm. At the place of the accident there were 4 tracks, and the accident occurred on the third track from the park. When White saw the boy the engine of the train was a little past him (White), and the boy was running along by the car about a block away from him. He started to run, and the witness supposed the draft of the train or something twisted him around and drew him under. The plaintiff had his hands reached out towards the car, as if he was reaching after it.

White, with others. went and got him up, and took him to a bench in the park, and from thence plaintiff was taken to the hospital, where he was found by his parents at about 8 o'clock the same evening; this accident occurred about 5 o'clock in the afternoon; the amputation of plaintiff's arm was rendered necessary by his injury; and plaintiff's left arm was amputated at his shoulder.

The Lake Park or Lake Front Park as it was sometimes called was a public park lying in the City of Chicago along the Shore of Lake Michigan a little over a mile long, and running from Park row on the south, to Randolph street on the north, and from Michigan avenue on the west to the west line of the right of way of the Illinois Central Railroad Company on the east, as shown by the plat "Exhibit A," (Rec. 32.)

The distance across said Lake Park from Michigan avenue to the right of way of the Illinois Central R. R. Co. is 280 feet. East of the park at the place where the plaintiff was injured, and a distance of 27 feet from said park, were 4 tracks of the Illinois Central Railroad Company running north and south, and at the distance of about 200 feet east of said Park is the breakwater of said Illinois Central Railroad Company, on the shore of Lake Michigan.

At the time of the passage of the Ordinance of 1852 and of the laying of said tracks, there was only a small strip of ground along Michigan avenue, with an interval of open water between the shore line and the railroad tracks of from 200 to 300 feet, known as the "Basin." Said railroad tracks from Park row north to Randolph street, were originally laid on piles driven in the water and standing in the open lake, and the breakwater was built outside and east of said tracks, and also in the open lake, at a distance of 200 feet east of the west line of the right of way of the Illinois Central Railroad, as defined in said ordinance. The surroundings remained in substantially that condition up to about the time of the great fire of October 9th, 1871, except that the southwest corner was filled up for about 100 feet from Park row, the tracks still being on piles in the open water.

After the fire, the park was gradually filled up from the ruins of the fire, and about two years previous to the injury, that part of the open space called the Lake Park, north of Peck court, was filled up. The last part filled up was between Harmon court and Peck court. And at the time of the accident said open space was all filled up west of and under the tracks. East of the tracks, it was filled up irregularly between the tracks and the breakwater, the water being close to the tracks in some places, and stones being thrown in to keep the water from washing away the dirt. In some places it was filled up sufficiently to allow people to get out to the breakwater. At Peck court there was a roadway across the park and tracks used by wagons hauling materials used in filling up the open space.

The said breakwater was erected by said Illinois Central Railroad Company about the same time its tracks were built upon piles.

The tracks (of the Illinois Central Railroad Company) had been used, with the consent or license of said Company, by the Chicago, Burlington & Quincy Railroad Company; Baltimore & Ohio Railroad Company; the Cincinnati, Lafayette & Chicago Railroad Company, and the defendant, for the period of five years and upwards prior to March 17th, 1878; and were also used by other roads in said city for the purpose of transferring freight to and from the yards near Randolph street. Trains and locomotives were passing along said tracks almost constantly.

The park was a public park, free to all who might go thereon, and frequented by children and others as a place of resort for recreation, especially on Sundays. At a place marked "*a*" on the plat, was a band-house for free open-air concerts. In the summer time especially crowds of people went on the park and across said tracks, to the breakwater beyond for the purpose of fishing and other amusements. At Harrison and Van Buren streets they used to cross over the track from the park to ferry-boats. At Peck court, where teams crossed the track, there was a flagman, and a great many people used to cross there and get on the breakwater.

By an ordinance of the common council of the city of Chicago adopted June 14th, 1852, (Rec. p. 18), permission was given the Illinois Central Railroad to construct tracks and maintain its road along the margin of the lake and adjacent to the Lake Park, and to operate its road in such manner "NOT INCONSISTENT WITH THE PUBLIC SAFETY" (Sec. 1), "as said company may from time to time establish," and "*in the manner and upon the terms and conditions*" prescribed in said ordinance.

Section 6 of that ordinance (Rec. p. 20), contains the following provision:

> "The said company shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore. as the same is herein before [in Sec. 1], defined, such suitable walls, fences, or other sufficient works as will prevent animals from straying upon or obstructing its tracks *and secure persons and property from danger*; said structure to be of suitable materials and sightly appearance, and of such height as the common council may direct."

At the time of the injury to the plaintiff there was a common five board fence, which was built by the Illinois Central Railroad Company, along the west line of its right of way in 1872, running from Park row north to the point marked *b* on the plat. The north end was broken down; and where it was constructed it did not prevent people from getting to the breakwater as there was water between the track and breakwater opposite the fence. With the exception of this short piece of dilapdated fence about 320 feet between Park row and opposite Harmon court, (that being but a very small portion of the space required to be fenced), neither the Illinois Central Railroad, nor any of the several companies using its tracks had erected any walls, fences, or other works, suitable or otherwise, as required by the ordinance, or taken any steps or precautious to keep visitors to the park from going in their tracks and across the same to the breakwater *or to mark the line where the park grounds ended and their right of way begun.*

The foregoing statement of facts taken almost bodily from the bill of exceptions (Rec. 25–29), presents questions of fact for the jury, which, if found in favor of the plaintiff entitled him to a judgment. The court below took the case away from the jury and directed a verdict for the defendant (Rec. 17), and therefore this judgment should be reversed and a new trial granted.

There are three counts in the declaration. The first two counts in substance, charging negligence in defendant using the tracks running along the Lake Park, without the same being fenced as required by the ordinances of June 14th, 1852, and alleging that plaintiff sustained his injury through such neglect. The third count, in substance, charging, that the defendant was guilty of negligence, at common law, in using such tracks, without taking any means to prevent injury to children and others, lawfully upon the Lake Park in the centre of a populous city, and who might stray upon such tracks.

The defendant introduced two additional ordinances of the city of Chicago relation to the right of way of the Illinois Central Railroad Company; (1) ordinance of September 10th, 1855, (Rec. p. 29); and (2) ordinance of September 15, 1856, (Rec. p. 31), but both of these ordinances relate to land lying north of a point 700 feet south of the north line, Randolph street, a point, more than 4,000 feet north of the place where plaintiff was injured, (See. Plat), and by express averment, those two ordinances were "subject to all the conditions and restrictions, as to the uses of "the same (the tracks) as are imposed upon that part of "said line by said ordinances of June 14th, 1852."

This case is, therefore, not affected in any manner by the last two ordinances.

II.

ASSIGNMENT OF ERRORS.

1st. The Court erred in refusing to allow said cause to go to the jury.

2nd. The Court erred in directing the jury to return a verdict in favor of the defendant.

3rd. The verdict is contrary to the evidence in the case.

4th. The verdict is contrary to the law of the case.

5th. The verdict is contrary to the law and the evidence.

6th. The Court erred in granting the plaintiff a new trial.

7th. The Court erred in overruling plaintiff's motion for a new trial therein.

8th. The Court below erred in entering judgment for defendant.

III.

BRIEF

I.

THE ILLINOIS CENTRAL RAILROAD COMPANY SHOULD HAVE ERECTED AND MAINTAINED A FENCE OR OTHER SUITABLE WORKS, TO PROTECT PERSONS UPON THE PARK FROM DANGER. THE OMISSION TO DO SO WAS GROSS NEGLIGENCE.

(See ARGUMENT, POST pp. 21–38.)

Sections 6 and 12 Ordinance June 14th, 1852 (Record 18.)

Agreement between the city of Chicago and the Illinois Central Railroad Company March 28th, 1853.

Shearman & Redfield on Negligence § 13, §54.

Thompson on Negligence p. 1,232.

Addison on Torts, p. 49.

Cooley on Torts, p. 658.

Sedgwick on Damages* p. 564.

Trow v. *Railroad Company*, 24 Vt. 488.

Schmidt v. *Railroad Co*,. 23 Wis. 186.

Siemers v. *Eisen*, 54 Cal. 421.

Railroad Co. v. *Ormsby*, 27 Gratt. 473.

State v. *Railroad Co.*, 52 N. H. 528.

Railroad Company v. *Geddis*, 33 Ill. 304.

Railroad Company v. *Terhume*, 50 Ill. 150.

Railroad Company v. *Herrick*, 13 Bush. 127.

Wilson v. *Brett*, 11 M. & W. 113.

McPhulers v. *Railroad*, 45 Mo. 26.

Austin v. *Manchester R. R.*, 11 Eng. L. E. R. 513.

Grill v. *General Iron Screw Company*, 1 L. R. C. P. 612.

Isabel v. *Railroad Co.*, 60 Mo. 486.

Brown v. *Railroad Co.*, 50 Mo. 461.

Marcott v. *Railroad Co.*, 49 Mich. 99.

Clark v. *Railroad Co.*, 28 Vt. 103.

Railroad Co. v. *Guard*, 24 Ind. 222.

Railroad Co. v. *Adams*, 26 Ind. 76.

Railroad Co. v. *Lewis*, 79 Pa. State 33.

Mason v. *Shawneetown*, 77 Ill. 533.

Tallman v. *Railroad Co.*, 4 Keys 128.

Railroad Co v. *Austin*, 21 Mich. 407.

Delzell v. *Railroad Co.*, 32 Ind. 45.

II.

THE MICHIGAN CENTRAL RAILROAD COMPANY IS EQUALLY LIABLE AS THE ILLINOIS CENTRAL RAILROAD COMPANY.

(See ARGUMENT, POST pp. 38–45.)

Shearman and Redfield on Negligence § 466.
Redfield on Railways § 127, Art. 8 (4 th Ed. p. 488)., p. 589 (4th Ed.)
Railroad Company v. *Kanouse*, 39 Ill. 272.
Railroad Company v. *Rumbold*, 40 Ill. 143.
Railroad Company v. *Gerber*, 82 Ill. 632.
Railroad Company v. *Lane*, 83 Ill. 448.
Railroad Company v. *Barron*, 5 Wall. 104.
Railroad Company v. *Brown*, 17 Wall. 445.
Clement v. *Canfield*, 28 Vt., 302.
Tracy v. *Railroad Company*, 38 N. Y. 433.
Gardner v. *Smith*, 7 Mich. 410.
Railroad Company v. *Austin*, 21 Mich. 390.
McCall v. *Chamberlain*, 13 Wis. 637.
Webb v. *Railroad Company*, 57 Me. 117.

Presumed to know the character of the surroundings from the lapse of time.

Railroad Co. v. *Russell*, 91 Ill. 298.
Springfield v. *Doyle*, 76 Ill. 202.
Chicago v. *Fowler*, 60 Ill. 322.

III.

DID THE PLAINTIFF CONTRIBUTE TO THE INJURY IN SUCH MANNER AS CHARGES HIM WITH NEGLIGENCE OR BAR HIS RECOVERY IN THIS ACTION?

Plaintiff was non sui juris.

(See ARGUMENT, POST pp. 45–50.)

Mangam v. *Railroad Company*, 38 N Y. 455.

Railroad Company v. *Becker*, 84 Ill. 483.

Railroad Company v. *Gregory*, 58 Ill. 227.

Gardner v. *Grace*, 1 F. & F. 359.

Lammert v. *Railroad Company*, 9 Bradwell 388.

Prendegast v. *Railroad Company*, 58 N. Y. 652.

Wright v. *Malden*, 4 Allen 283.

Kreig v. *Wells*, 1 E. D. Smith 74.

Callaghan v. *Bean*, 9 Allen 401.

Railroad Company v. *Wolf*, 59 Ind. 89.

O. Flaherty v. *Railroad Company*, 45 Mo. 70.

Mascheck v. *Railroad Company*, 3 Mo. App. 600.

Railroad Company v. *Huffman*, 28 Ind. 287.

Railroad Company v. *Bowen*, 40 Ind. 545.

McGany v. *Loomis*, 63 N. Y. 104.

Railroad Company v. *Caldwell*, 74 Pa. St. 421.

Railroad Company v. *Mahoney*, 57 Pa. St. 187.

McLain v. *Vanzandt*, 7 Jones & S. R. 347.

Lehman v. *Brooklyn*, 29 Barb. 234.

Meeks v. *Railroad Company*, 52 Cal. 602.

McMahon v. *New York*, 33 N. Y. 642.

Nagle v. *Railroad Company*, 6 W. N. C. 510.

Railroad Company v. *Vining*, 27 Ind. 513.

Achtenhagen v. *Watertown*, 18 Wis. 331.

Railroad Company v. *Stumps*, 69 Ill. 409.

Railroad Company v. *Hack*, 66 Ill. 238.

Lammert v. *Railroad Co.* 9 Bradwell 388.

Chicago v. *Starr*, 42 Ill. 174.

IV.

THE NEGLIGENCE OF PLAINTIFF'S PARENTS, IS NOT IMPUTABLE TO PLAINTIFF, EVEN IF THEY HAD BEEN PROVEN TO HAVE BEEN NEGLIGENT.

(See ARGUMENT, POST pp. 50-57.)

Railroad Company v. *Snyder*, 18 Ohio St. 399.
Railroad Company v. *Moore*, 16 Cent. L. J. 273.
Railroad Company v. *Hanlon*, 53 Ala. 70.
Kay v. *Railroad Co.*, 65 Pa. St. 269.
Mangam v. *Railroad Co.*, 38 N. Y. 455.
Railroad Co. v. *Ormsby*, 27 Gratt. 455.
Whirley v. *Whiteman*, 1 Head 610.
Robinson v. *Cone*, 22 Vt. 213.
Rauch v. *Lloyd*, 31 Pa. St. 358.
Smith v. *O'Conner*, 48 Pa. St. 214.
Chicago v. *Major*, 18 Ill. 349.
Isabel v. *Railroad Company*, 60 Mo. 478.
Railroad Company v. *Mahoney*, 57 Pa. St. 187.
Walters v. *Railroad Co.*, 41 Ia. 75.
Daley v. *Railroad Co.*, 26 Conn. 591.
Field on Corporations, § 556.
Wharton on Negligence, § 310.
Thompson on Negligence, 1,184.

The case of

Hartfield v. *Roper*, 21 Wend 615, distinguished.

V.

THE NEGLIGENCE ON PLAINTIFF'S PARENTS A QUESTION FOR THE JURY.

(See ARGUMENT, POST pp. 57–61.)

Johnson v. *Railroad Company*, 49 Wis. 529.
St. Paul v. *Kuby*, 8 Minn. 154.
Mangam v. *Railroad Company*, 38 N. Y. 455.
Lynch v. *Smith*, 104 Mass. 52.
Mulligan v. *Curtis*, 100 Mass. 512.
O. Flaherty v. *Railroad Company*, 45 Mo. 70.
Isabel v. *Railroad Company*, 60 Mo. 475.
Railroad Company v. *Snyder*, 18 O. St. 399.
Meeks v. *Railroad Company*, 56 Cal. 518.
Karr v. *Parks*, 40 Cal. 188.
McMahon v. *Railroad Company*, 39 Md. 438.
Railroad Company v. *Fryer*, 30 Md. 47.
Drew v. *Railroad Company*, 26 N. Y. 49.
Prendegast v. *Railroad Company*, 58 N. Y. 652.
Fullon v. *Railroad Company*, 64 N. Y. 13.
Railroad Company v. *Kelly*, 31 Pa. St. 372.
Railroad Company v. *Pearson*, 72 Pa. St. 169.
Kay v. *Railroad Company*, 65 Pa. St. 269.
Railroad Company v. *Lang*, 75 Pa. St. 257.
Rauch v. *Lloyd*, 31 Pa. St. 358.
Townley v. *Railroad Company*, 53 Wis. 626.
Schmidt v. *Railroad Company*, 23 Wis. 186.
Chicago v. *Major*, 18 Ill. 349.
Railroad Company v. *Ormsby*, 27 Gratt. 476.
Walters v. *Railroad Company*, 41 Ia. 71.

VI.

PLAINTIFF'S PARENTS WERE NOT GUILTY OF ANY NEGLIGENCE.

(See ARGUMENT, POST pp. 62–69)

Railroad Company v. *Becker*, 84 Ill. 483.
Railroad Company v. *Gregory*, 58 Ill. 227.
Railroad Company v. *Bumpstead*, 48 Ill. 221.
Chicago v. *Hesing*, 83 Ill. 204.
Chicago v. *Major*, 18 Ill. 349.
O. Flaherty v. *Railroad Company*, 45 Mo. 70.
Walters v. *Railroad Company*, 41 Ia. 71.
Frick v. *RailroadCompany*, 75 Mo. 542.
Morgan v. *Illinois etc. Bridge Co.*, 5 Dill 96.
Smith v. *Railroad Company*, 25 Ka. 738.
Isabel v. *Railroad Company*, 60 Mo. 483.
Karr v. *Parks*, 40 Cal. 188.
Mangum v. *Railroad Company*, 38 N. Y. 455.
Prendegast v. *Railroad Company*, 58 N. Y. 652.
Railroad Company v. *Bohn*, 27 Mich. 503.

VII.

THE CARE REQUIRED OF A CHILD IS TO BE DETERMINED BY THE JURY UNDER THE CIRCUMSTANCES OF EACH CASE, CONSIDERING THE CHILD'S AGE, INTELLIGENCE AND CAPACITY.

(See ARGUMENT, POST pp. 69–76.)

Shearman on Negligence, § 49.
Wharton on Negligence, §§ 310, 322, 420.
Field on Corporations, § 556.
Railroad Co. v. *Gladmon*, 15 Wall. 408.
Railroad Co. v. *Stout*, 17 Wall. 657.

Chicago v. *Major*, 18 Ill. 349.
Kerr v. *Forgue*, 54 Ill. 482.
Railroad Co. v. *Gregory*, 58 Ill. 226.
Railroad Co. v. *Murray*, 71 Ill. 601.
Weick v. *Lander*, 75 Ill. 93.
Railroad Co. v. *Delany*, 82 Ill. 198.
Railroad Co. v. *Becker*, 84 Ill. 483.
Railroad Co. v. *Bohn*, 27 Mich. 504.
Daniels v. *Clegg*, 28 Mich. 32.
Oldfield v. *Railroad Co.*, 14 N. Y. 310.
O'Mara v. *Railroad Co.*, 38 N. Y. 449.
Cosgrave v. *Ogden*, 49 N. Y. 255.
Reynolds v. *Railroad Co.*, 58 N. Y. 252.
Thurber v. *Railroad Co.*, 60 N. Y. 326.
McGovern v. *Railroad Co.*, 67 N. Y. 421.
O'Brian v. *Glinchy*, 68 Me. 552.
Keffe v. *Railroad Co.*, 21 Minn. 207.
Schmidt v. *Railroad Co.*, 23 Wis. 186.
Johnson v. *Railroad Co.*, 49 Wis. 529.
Boland v. *Railroad Co.*, 36 Mo. 484.
O'Flaherty v. *Railroad Co.*, 45 Mo. 70.
Koons v. *Railroad Co.*, 65 Mo. 592.
Walters v. *Railroad Co.*, 41 Iowa 71.
Rauch v. *Lloyd*, 31 Pa. St. 358.
Kelley v. *Railroad Co.*, 31 Pa. St. 372.
Railroad Co. v. *Spearin*, 47 Pa. St. 300.
Smith v. *O'Conner*, 48 Pa. St. 218.
Railroad Co. v. *Fielding* 48 Pa. St. 320.
Railroad Co. v. *Mahoney*, 57 Pa. St. 187.
Kay v. *Railroad Co.*, 65 Pa. St. 269.
Railroad Co. v. *Caldwell*, 74 Pa. St. 421.
Crissy v. *Railroad Co.*, 75 Pa. St. 83.
Railroad v. *Hussard*, 75 Pa. St. 367.
Railroad Co. v. *Lewis*, 79 Pa. St. 33.
Railroad Co. v. *Ormsby*, 27 Gratt. 455.
Railroad Co. v. *Snyder*, 18 Ohio (N. S.) 399.

Birge v. *Gardner*, 19 Conn. 507.
Daley v. *Railroad Co.*, 26 Conn. 591.
Brennan v. *Railroad Co.*, 45 Conn. 284.
Railroad Co. v. *Fitzsimmons*, 22 Ka. 687.
St. Paul v. *Kuby*, 8 Minn. 154.
State v. *Railroad Co.*, 24 Md. 84.
Railroad Co. v. *State*, 30 Md. 47.
McMahon v. *Railroad Co.*, 39 Md. 438.
Railroad Co. v. *McDonnell*, 43 Md. 534.
Munn v. *Reed*, 4 Allen 431.
Elkins v. *Railroad Co.*, 115 Mass. 190.
Lynch v. *Smith*, 104 Mass. 52.
Milligan v. *Curtis*, 100 Mass. 512.
Hunt v. *Salem*, 121 Mass. 294.
Murley v. *Roche*, 130 Mass. 330.
Lane v. *Atlantic Works*, 111 Mass. 136.
Lynch v. *Nurdin*, 1 Q. B. 29.
Gardiner v. *Grace*, 1 F. & F. 359.
Williams v. *Railroad Co.*, L. R. 9 Ex. 157.
Karr v. *Parks*, 40 Cal. 188.
Schierhold v. *Railroad Co.*, 40 Cal. 449.
Robinson v. *Cone*, 22 Vt. 213.

VIII.

THE MERE FACT THAT PLAINTIFF WAS UPON THE RAILROAD TRACKS, WHEN INJURED, DOES NOT BAR RECOVERY.

(See ARGUMENT, POST pp. 76–92.)

Redfield on Railways, page 546.
Railroad Company v. *Stout*, 17 Wall. 657.
Keffe v. *Railroad Company*, 21 Minn. 207.
Railroad Company v. *Fitzsimons*, 22 Kas. 686.
Kay v. *Railroad Company*, 65 Pa. St. 272.

Townley v. *Railroad Company*, 53 Wis. 626.
Whirley v. *Whiteman*, 1 Head 610.
Birge v. *Gardiner*, 17 Conn. 506.
Railroad Company v. *St. John*, 5 Sneed 524.
Robinson v. *Cone*, 22 Vt. 23.
Lynch v. *Nurdin*, 1 Q. B. 29.
Railroad Company v. *McGinnis*, 71 Ill. 346.
Railroad Company v. *High*, 14 Neb. 14.
Bird v. *Hollbrook*, 4 Bing. 628.
Johnson v. *Patterson*, 14 Conn. 1.
Daly v. *Railroad Co.*, 26 Conn. 591.
Brennan v. *Railroad Co.*, 45 Conn. 254.
State v. *Moore*, 31 Conn. 479.
Loomis v. *Terry*, 17 Wend. 497.
Norris v. *Litchfield*, 35 N. H. 271.
Mullaney v. *Spence*, 15 Abb. Prac. (N. S.) 319.
Hydraulic Works v. *Orr*, 83 Pa. St. 332.
Barnes v. *Ward*, 9 C. B. 392.
Hadley v. *Taylor*, L. R. 1 C. P. 53.

IX.

THE WANT OF THE FENCE WAS THE PROXIMATE CAUSE OF THE INJURY.

(See ARGUMENT, POST pp. 92–96.)

Railroad Co. v. *Kellogg*, 94 U. S. 469.
Williams v. *Railroad Co.*, L. R. 9, Ex. 157.
Railroad Co. v. *Fielding*, 48 Pa. St. 320.
Railroad Co. v. *Mahoney*, 57 Pa. St. 187.
Rauch v. *Lloyd*, 31 Pa. St. 358.
Powell v. *Salisbury*, 2 Younge & J. 391.
Lee v. *Riley*, 18 C. B. (N. S.) 722.
Salisbury v. *Heschenroder*, 106 Mass. 458.
Schmidt v. *Railroad Co.*, 23 Wis. 186.

Birge v. *Gardner*, 19 Conn. 507.
Brown v. *Railroad Co.*, 50 Mo. 461.

X.

THE PROXIMATE CAUSE OF THE INJURY TO THE PLAINTIFF, A QUESTION FOR THE JURY.

(See ARGUMENT, POST pp. 96-98.)

Railroad v. *Stout*, 17 Wall. 663.
Railroad v. *Kellogg*, 94 U. S. 469.
Manchester v. *Erickson*, 105 U. S. 347.
McMahon v. *Railroad Co.* 39 Md. 438.
Schmidt v. *Railroad Co.* 23 Wis. 186.
Railroad Co. v. *McDonell*, 43 Mo. 534.
Clemens v. *Railroad Co.* 53 Mo. 366.
Rauch v. *Lloyd*, 31 Pa. St. 358.
Railroad Co. v. *Kelley*, 31 Pa. St. 372.
Railroad Co. v. *Mahoney*, 57 Pa. St. 187.
Fairbanks v. *Kerr*, 70 Pa. St. 86.
McGrew v. *Stone*, 53 Pa. St. 436.
Trow v. *Railroad Co.*, 24 Vt. 488.
Lake v. *Milliken*, 62 Me. 240.
Railroad Co. v. *Pindar*, 53 Ills. 447.
Perley v. *Railroad Co.*, 98 Mass. 414.
Kellogg v. *Railroad Co.*, 26 Wis. 223.

XI.

NEGLIGENCE A QUESTION FOR THE JURY.

(See ARGUMENT, POST pp. 98–102.)

Railroad Co. v. *Gladmon*, 15 Wall. 401.
Railroad Co. v. *Stout*, 17 Wall. 665.
Thompson on Negligence, p. 1235, § 10.
Cooley on Torts, p. 670.

Marcott v. *Railroad Co.*, 47 Mich. 1.
Railroad Co. v. *Van Steinurg*, 17 Mich. 120.
Railroad Co. v. *Slatterly*, L. R. 3 App. Cas. 1155.
Townley v. *Railroad Co.*, 53 Wis. 626.
Railroad Co. v. *McDonell*, 43 Md. 543.
Railroad Co. v. *Dill*, 22 Ills. 271.
Williams v. *Railroad Co.*, 11 Am. & Eng. R. R. Cases, 424.
Railroad Co. v. *Callarn*, 73 Ind. 261.
Railroad Co. v. *Henrice*, 92 Pa. St. 431.
Park v. *O'Brien*, 23 Conn. 338.
Railroad Co. v. *Bailey*, 11 Neb. 332.
Railroad Co. v. *Fitzsimmons*, 22 Kas. 686.
Oldfield v. *Railroad Co.*, 14 N. Y. 310.
Kay v. *Railroad Co.*, 65 Pa. St. 274.
Daley v. *Railroad Co.*, 26 Conn. 591.
Railroad Co. v. *Becker*, 76 Ills. 33.
Robinson v. *Cone*, 22 Vt. 225.
Birge v. *Gardiner*, 19 Conn. 507.
State v. *Railroad Co.*, 52 N. H. 528.

See also cases cited in last preceding (IX) point of Brief.

Pleasants v. *Fant*, 22 Wall. 116, distinguished.

IV.

ARGUMENT.

I.

THE ILLINOIS CENTRAL RAILROAD COMPANY SHOULD HAVE ERECTED AND MAINTAINED A FENCE OR OTHER SUITABLE WORKS TO PROTECT PERSONS UPON THE PARK FROM DANGER. THE OMISSION TO DO SO WAS GROSS NEGLIGENCE.

The ordinance of the city of Chicago, authorizing the Illinois Central Railroad Company to lay down, construct and maintain its tracks within the city limits, and across the open space known as Lake Park, required said company to operate its road under "rules, and regula-"tions," and arrangements, "not inconsistent with the "public safety." (Ord. Sec. 1, Rec. p. 18).

It was manifestly inconsistent with the public safety that railroad tracks over which were run the trains of five thoroughly equipped railroads and upon which trains were passing "almost constantly" (Rec. p. 26), within 27 feet (Rec. p. 25) of a public park free to all who might go thereon and frequented by children, in the centre of a great city, where free open-air concerts were held and when crowds of people went, without a fence or other suitable works to at least indicate that, on this side was safety, and on that--danger. In this case it appears (Rec. p. 27), that none of the railroad companies using the tracks so situated—the defendant being one of the five—had taken any steps or precautions to prevent persons in the park from going on the tracks or across them to the breakwater; not even going to the trouble of putting up warning signs. A fence at least was required as a compliance with the provisions of the first section of the ordinance; and in failing to erect it, the Illinois

Central Railroad Company failed, under the requirements of that section to perform a duty required by law for the protection of persons and property. It needs no citation of authorities to establish that to be *gross* negligence.

But the Sixth Section of the ordinance (Rec. p. 20) is more explicit and consequently more imperative. It ordains that "the said company SHALL ERECT AND MAIN-"TAIN on the inner line of ground pointed out for its "main tracks,"—which is the exact east line of the Lake Park—"such suitable walls, fences, or other sufficient "works, as will secure persons from danger."

The record page 27 shows that this requirement was utterly disregarded, and that all these railroads were running all their trains within 27 feet of this public park, frequented by crowds of people and a play ground for children, without erecting or maintaining on the line required by the ordinance any wall, fence or other works, whatever, suitable or otherwise.

If this be not gross negligence, we are utterly unable to imagine what amount of disregard of positive law, designed for the protection of persons from danger, or what amount of disregard of ordinary prudence in the use of dangerous machinery can be held to constitute gross negligence. It seems to us to constitute gross negligence at common law, and without regard to the ordinance.

In Shearman and Redfield on Negligence (§ 13), the rule is thus stated: "The failure of any person to perform a duty imposed upon him by a statute or other legal authority should always be considered evidence of negligence, or something worse. Whether it constitutes such negligence, as tended to cause the injury to the plaintiff, in any particular case, is another question, the principles governing which are stated elsewhere; but such an omission must constitute just cause for complaint on the part of the State, if not of individuals; and when no evil intent appears, the omission may properly be regarded as simple negligence. The omission to perform a legal duty being proved, the plaintiff ought not to be required to prove further that the act omitted was inherently essential to the exercise of due care by the defendant. Thus, if a railroad company is required by law to fence its tracks, to ring bells, or to give other warnings of danger; or if one building a wall is required to make it of a certain thickness; or if obstructions to a street are prohibited, a violation of any of these legal regulations is sufficient evidence of negligence."

Section 54: "So if a specific duty is imposed upon any person by law, or by legal authority, an action may be sustained against him by any person who is specially injured by his failure to perform that duty."

In Thompson on Negligence, page 1232, Sec. 5, it is said:

"If a duty is enjoined upon A by express statute, and B is, without fault on his part, injured by reason of the fact that A has failed to perform it, B makes out a case of damages against A by merely showing that A's neglect to comply with the statute was a proximate cause of the injury which he sustained. The courts frequently express this rule by saying that a failure to perform a statutory duty is negligence *per se*. * * * * * *

There appears to be no good reason why the same principle should not be equally applied to a neglect to perform a duty arising at common law; and it has been so applied."

The fact that the ordinance itself does not impose a liability upon the railroad company for any damages arising through the breach of this duty does not release the defendant.

The law is thus stated in Addison on Torts (D. & B. ed. 1876), p. 49.

"Whenever a statute creates a right or a duty or an obligation, then, although it has not in express terms given a remedy, the remedy which, by law, is properly applicable to that right or obligation follows as an incident."

In Cooley on Torts, p. 658; it is laid down:—

"But without going further into particulars, it is sufficient, to say of the authorities, that they recognize the rule as a general one, that where the duty is imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none."

Sedgwick on Damages, *p. 564, says:

"There is a large class of cases where a statute, while directing or prohibiting some particular act, omits to annex any penalty, or to prescribe any measure of damages. In these cases the party aggrieved by the forbidden act or omission, has his remedy at law. The neglect of a compulsory statute which annexes no penalty to the transgression, will found an action at common law to those who have interest, ordaining the defendant either to do what the statute requires or to pay damages."

In *Trow* v. *Railroad*, 24 Vt., 488, where a horse got upon the railway track through the want of a fence, the Court say (p. 492):

"If, in this case, the injury arose solely from the neglect of the defendants to erect and maintain suitable fences and guards for the protection of animals, the charge of the court, so far as the defendants are concerned, is unobjectionable. They have no reason to complain of the degree of diligence and care which the court required them to exercise, for under the instructions given, they were held liable only in cases of gross neglect in making and maintaining such erections. If there were error in this, it was in favor of the defendants, and is that for which they have no cause of exception. The jury have found the defendants guilty of gross neglect in the peformance of this duty; and although this neglect may not be considered the proximate but the remote cause of the injury, their liability is a necessary consequence, unless there are some other facts existing in the case, otherwise affecting it.

The duty of maintaining fences and erecting cattle-guards, for such purposes, is imposed upon the corporation, not only as a matter of safety in the use of their roads and running their engines thereon, *but also as a matter of security to the property of those living near and contiguous to the road. And this arises from the consideration, that they must know and reasonably expect, that without such precautions, such injuries will naturally and frequently arise.* And when, for the distance mentioned in this case, no precautions of that kind were used upon this road, and in a place so public and common, we think, as a matter of law, there was that neglect which, under the corporation, liable for injuries arising solely from that cause."

In *Schmidt* v. *R. R. Co.*, 23 Wis. 186, a child 18 months old was killed, and the company claimed that the child was a trespasser, and that it was not required to fence the road for its protection. The court say:

"Now, when the company neglected to perform this duty, did it not necessarily assume responsibility for all damages which might result from that cause? Can the court make an exception to this general liability, when an infant is injured, solely in consequence of the want of a fence, no negligence of the parents contributing thereto?

"Would it not be an unwarrantable restriction of the Statute to hold that the duty imposed upon the company of maintaining a fence along its road had no reference to such children? * * * * *

"And this recovery is had in such a case, upon the ground that when the company neglects to perform a duty imposed by the statute, it 'necessarily assumes responsibility for all damages which may ensue from that cause.' Thus a liberal construction has already been placed upon the statute for the purpose of furthering the important and beneficial objects of its enactment. It has been extended to cases which, if not clearly within the letter, are certainly within the spirit of the law, as when it was applied to the case of a passenger injured in consequence of a failure of the company to fence its road. And it is in strict harmony with the principle and reasoning of these cases to say that the statute also embraces a case like the one before us.

"*Here, if the fence had been erected, the accident would not have happened.* Solely and entirely from the "no right to touch or interfere with it. So running a rail-"road close to a man's house where his family and chil-"dren resided, would require that certain safe-guards "should be used to shield them from danger." * * * "The failure to fence was merely introduced in evi-"dence as an element conducing to show negligence; and "under all circumstances, as the company had built its "road close to the house, and was aware that the family "resided there, I cannot say that it was error. OWING TO "THE DANGER AT THAT PARTICULAR PLACE, MADE SO BY "THE COMPANY'S ACT, A CORRESPONDING DILIGENCE DE-"VOLVED UPON IT."

In *Brown* v. *Railroad Company*, 50 Mo. 461, the railroad company obstructed a crossing, and plaintiff, in crossing the tracks, where the public were in the habit of going, but not at a crossing, was injured, the court say: (p. 467).

"The crossing was obstructed by the defendant's "train, and the plaintiff, therefore, to pursue her journey, "turned away and crossed at another place where people "were accustomed to cross, but it does not appear that "they had any license therefor.

"The defendant had the right to stop its train at the "crossing for a reasonable time, but when the train did "stop and obstructed the crossing for the purpose of un-"loading cars, as was the case here, were travelers al-"ways obliged to wait before they could continue their "business, till the cars were unloaded? While the rail-"road company is the absolute owner of its track and has "a right to its free and unmolested use, still it is not ab-"solved from the exercise of ordinary care and diligence to "prevent injury to others when they happen on the track "under the circumstances in which the plaintiff was placed.

"Greater care and foresight must necessarily be used "within the limits of a town than would be required in "the country. In town, caution should always be used. "*There is no absolute rule as to negligence to cover all cases.* "THAT WHICH IS NEGLIGENCE IN ONE CASE, BY CHANGE "OF CIRCUMSTANCES WILL BECOME ORDINARY CARE IN "ANOTHER, OR GROSS NEGLIGENCE IN A THIRD. Circum-"stances, time and place must be taken into account, and "the relative degree of care, or want of it, grow out of the "surroundings and conduct of both parties. The degree "of care required of persons having charge of locomotives and cars, upon tracks in towns, varies according to "the circumstances of the case, and must be proportioned "to the danger to be apprehended of inflicting injury upon others. The rule which would apply in one case, or "at a certain given time, might be entirely inadequate as "a test when applied to a different state of things.

"As the crossing was obstructed, by the act of the "defendant, and persons were in the habit of going over "the private way, we think that the agents and servants "of the defendant were bound to take notice of these facts, "and use a precaution commensurate with them."

In *Marcott* v. *Railroad Co.*, 49 Mich. 99, which was a suit for damages for causing the death of a child three years old by reason of his straying upon the railway tracks, the court (Cooley, J.,) says:—

"Several errors are also assigned upon the charge. "Some of these refer to the neglect of the defendant to "fence its tracks at the place of the injury. But on this "branch of the case *the charge was eminently fair.* We "have no statute requiring fences for protection against "personal injuries, and *the Judge charged the jury that if "the construction of a fence would have prevented this accident and saved the child, then it was neglect in defendant "not to have had a fence there.*"

In *State* v. *Railroad Company*, 52 N. H. 528; *ante.*— Where the *nisi prius* court instructed the jury "that gross negligence is the want of slight care," the reviewing court say: "The fourth instruction is also correct, for although of late the distinction between the degrees of negligence has been attempted to be obliterated, and the existence of any such distinction has been denied, and gross negligence has been held to mean the same thing as negligence, with the addition of a vituperative epithet. *Perkins* v. *Central Railroad Co.*, 24 N.Y., 196, 206; *Wells* v. *Central Railroad Co.*, 24 N. Y., 181; *Smith* v. *Central Railroad Co.*, 34 N. Y., 223, 241; *New World* v. *King*, 16 How. 474; *Wilson* v. *Brett*, 11 Mees & Wels, 113. Yet we have no particular objection to the distinctions made by the civil law as well as the common law; and so long as different degrees of care are required in different positions we see no objection to giving names to them, and also to their corresponding degrees of negligence. Slight negligence is the want of great care and diligence, ordinary negligence is the want of ordinary care; and gross negligence is the want of even slight care. 1 Kents Com., 560, and seq.; Angell on Carriers, 10, 11; Story on Bail., secs. 17, 18; Shear. and Redf. on Neg. secs. 16, 17, 18. But the distinction is after all mainly verbal."

If the circumstances in this case do not show gross negligence, then the want of ordinary care can never be proven. It shows a want of even the slightest care. The mere fact that there was no fence between the park and the right of way of the Illinois Central Railroad Company was gross negligence.

In *Railroad Company* v. *Geddis*, 33 Ill. 304, and *Railroad Company* v. *Terhune*, 50 Ill. 151, it is held that the failure to ring a bell or sound a whistle at a crossing where required by Statute is negligence which would render the company liable for all damages growing out of the neglect of such duties.

In *Railroad Company* v. *Herrick*, 13 Bush. 127, the court say:—"The absence of slight care in the government of a railroad train or keeping of railroad track in repair is *gross* negligence."

Rolfe, B., in *Wilson* v. *Brett*, 11 M. & W. 113, says the difference between negligence and *gross* negligence is the addition of a vituperative epithet.

So held also in *McPhulers* v. *Railroad*, 45 Mo. 26, and in *Austin* v. *Manchester, R. R.*, 11 Eng. L. Eq. R. 513.

In *Grill* v. *General Iron Screw Company*, 1 L. R. C. P. 612. Willis, B., says: "Gross negligence is only the absence of ordinary care."

In *Clark* v. *Railroad*, 28 Vt. 103, it is said that in the absence of any statute or ordinance as to time, a railroad should be fenced by the company before it commenced to use the tracks.

Railroad Company v. *Guard*, 24 Ind. 222.

Where the railroad track ran along a public road, the court say:—

> "The railroad company was bound to fence its road, and the fact that it ran along side of a public highway, construing the law as a police regulation for the safety of the public, would seem in the case at bar, to require particular care in complying with the provisions of the act."

In *Barrett* v. *Railroad Co.*, 1 F. & F. 361, there was no right of way, but people had been in the habit of crossing the road for years, at the place where the plaintiff was injured, and the court say:—

> "Though there was no right of way, still the circumstances of people being in the habit of passing, threw upon the company the responsibility of using reasonable care before moving over that portion of their line."

In *Railroad* v. *Adams*, 26 Ind. 76, it is held that greater care is required in a city than out of it, in a case, where plaintiff was walking on track, and was struck by engine moving at 30 miles per hour; and that where the negligence of the defendant is so gross as to imply a disregard of consequences, or a willingness to inflict the injury, the plaintiff may recover though he be a trespassor, or did not use ordinary care to avoid the injury.

In *Davis* v. *Railroad Co.*, a case decided in November last, by the Supreme Court of Wisconsin, where the railroad tracks were used by the public for more than twenty years as a passage way.

The court say: "The railroad company owes the person who may be upon its track or right of way, by its acquiescence a duty of care towards such person which it does not owe to mere trespassers, and is not at liberty to treat them as trespassers."

(Reported in Vol. 17, Nor. Wes. Rep., p. 416).

In *Railroad Co.* v. *Lewis*, 79 Pa. St. 33, where a boy eight years old was sent by his mother on an errand in Harrisburg and instead of taking the road, walked upon the railroad tracks, and was killed by a train going at the rate of from 18 to 25 miles an hour.

The court (Agnew, C. J.) says, the court below "left the great question of the cause to the jury in fitting terms; that is, whether the train was "running at a safe and prudent rate of speed"; or "was the rate at which the train was approaching and running dangerous and reckless?" Again, "if you find that defendant's train was running at the usual rate of speed and not at a reckless and dangerous rate, but with proper care and caution, upon a good track, with the best brake then known, and with a due regard—and by this I mean with that regard that a prudent man would have—for the protection of human life, under the circumstances of the case, then we say to you the plaintiff cannot recover, and your verdict should be for the defendants." Surely this was not exacting an unjust or illegal degree of care and caution of the company entering within the outer limits of the city of Harrisburg where the accident happened. It took place at the Lochiel Iron Works, situated immediately alongside of the track, where numerous hands were constantly passing and repassing, and in the vicinity of the rows of houses occupied by the hands employed in these large works, and in a neighborhood where many persons were likely to be.

* * * * * * * * * *

"Is it common prudence or ordinary care to run into "the outskirts of a city at a rate of speed so high and "reckless that persons happening upon the track are liable "at any moment to be overtaken and crushed to death? "Conceding that these people are trespassers, yet must "we have no regards to the habits, character, condition "and circumstances of a people living in a city and immediately on the line of a railroad? Clearly to disregard "them would be contrary to our sense of humanity, and to "that common judgment of mankind expressed in the "maxim "*Sic utere tuo ut alienum non lœda*," and that "rule of right-doing which requires men to do unto others "as they would have others do unto themselves. But beyond this there is also that supervising authority of the "state, which, by its police powers, is enabled to regulate "even positive rights, when it is necessary for the safety, "protection and welfare of the people. Hence it has been "held that the speed of trains through towns and cities "may be regulated by municipal ordinances."

"But the absence of any such positive regulation does not leave the way open to a railroad company to run its trains into a populous town at a dangerous and reckless rate of speed. Are the circumstances of the case not to be heeded, and are the people, regardless of the probability of the loss of life, to be run down and crushed to death merely because they happen to be trespassers? Does no duty rest upon a railroad company, because it is running upon its own track, unfenced and unguarded? Surely we must not disregard the habits, character and condition of a people, accustomed to run thoughtlessly and unheedingly into danger. We must take into account the feebleness of age and helpless infancy, the infirmity of mind and body of many living on a railroad track, their want of reflection and unthinking heedlessness, their want of apprehension of danger, and entire absence of injury they suppose they do to the track of a railroad; the many motives they have to do an act which, though trespass, is seemingly to them no cause of complaint. Surely the courts have not lost their power to declare what is ordinary prudence and care in the use of its track by a railroad company merely because the track is its own, and no one may rightfully trespass there. THE CIRCUMSTANCES WHICH QUALIFY THIS RIGHT MUST BE TAKEN INTO ACCOUNT AND SUBMITTED TO A JURY UNDER PROPER INSTRUCTIONS. It is said this is to submit the company to the influence of prejudice, and that juries are always unfavorable. The causes of this prejudice, it is not proper to discuss, *but the common sense of mankind is not often very far wrong*. Not to submit circumstances to a jury upon the evidence, and under the controlling power of a court is simply to set aside the trial by jury. Whether the population is dense or sparse at the *locus in quo*, what is the likelihood of danger, and what the rate of speed compatible with the public safety, under the circumstances, are facts which necessarily find their way into the jury box. When it is thus determined that the rate of speed is incompatible with public safety, under the circumstances of the place, the rights of the company, even upon its own track, are qualified by the great law of public good. Life is too sacred to become a sport of chance, or the sacrifice of heedless will. "*Salus populi est suprema lex*," "*Necessitas vincit legem et quod coget, defendit.*"

The power of the city to "regulate the use of locomotive engines within the city," and to "direct and control the location of railroad tracks" as well as its general police power under its charter (Rec. p. 32) is unquestioned.

Having the power to direct and control the location of the tracks it had the power to impose terms upon which such tracks should be laid.

> "And when an incorporated town or city has been invested with power to pass an ordinance, by the legislature, for the government or welfare of the municipality, an ordinance enacted by the legislative branch of the corporation, has the same force and effect as a law passed by the legislature, and cannot be regarded otherwise than a law of, and within the incorporation. An ordinance is the law of the inhabitants of the municipality."
> *Mason* v. *Shawneetown*, 77 Ills. 533.

But in addition to the obligation imposed by law upon the Illinois Central Railroad Company, to build a fence along the east line of the Lake Park, it had voluntarily and expressly agreed by its agreement of March 28, 1853 (Rec. p. 23), "to do and perform, according to the true intent and meaning thereof, all the things required to be done by the terms of said ordinance."

So that if the city had not been empowered by its charter to enact such an ordinance, both the city and its people had a right to rely, in the interest of the public safety, upon the company complying with its covenants made in consideration of being allowed to lay its tracks where they were dangerous to the public without compliance with such agreement, and we insist that outside the ordinance the failure to comply with its agreement was such a disregard of its duty to the public as to make its default a matter of gross negligence.

It is no excuse for the failure to build this fence, that the common council is not shown to have prescribed the height of the fence. The railroad company was required and agreed to construct "suitable walls, fences, or other "sufficient works," to "secure persons or property from "danger." That was their covenant and agreement. The statement, "said structure to be of suitable materials and "sightly appearance, and of such height as the common "council may direct," is descriptive and directory—in the nature of an architect's specification; reserving to the architect—the city—the right to direct how high the structure should be, but not making such direction a condition precedent to the performance of the duty and obligation of the railroad company to build the structure; and leaving it entirely subsidiary to the order and agreement to build. In the absence of direction by the city it was the duty and obligation of the railroad company to build such a structure as would reasonably "secure per-"sons or property from danger." The question of the reasonableness of the structure for the purpose does not arise, because they built no fence reasonable or unreasonable.

This construction of the ordinance is not only consonant with common sense and reason, but is fully sustained by the authorities.

In *Tallman* v. *Railroad*, 4 Keyes 128, the plaintiff's cows got upon the railroad track by reason of a defective fence, and were killed. The statute prescribed that all railroads should erect and maintain fences at the sides of their roads *of the height and strength of a division fence required by law.*

The town had neglected to fix a standard as to height and strength of fences, and the railroad company insisted that, as there was no statute regulating the height or strength of a division fence, they were not bound to erect *any* fence.

The court say:—

> "It will not do for these railroads to entirely omit this duty upon the plea that they are not informed as to the precise height and strength they must make the fences. The object of this statute requirement is to prevent these domestic animals from escaping from the adjoining fields upon the railroad track, and considering this Statute,
>
> "Judge Denio said, in the case of *Corwin* v. *Erie Railroad Co.* (3 Kern. 54), that the design of the statute was "to require the railroad to inclose their tracks with substantial fences."

And again on page 134, the court say:—

> "This provision of the statute then is unquestionably for the public good. The well known rule consequently applies: "a statute made *pro bono publico* shall be construed in such a manner that it may, as far as possible, attain the end proposed." *Pierce* v. *Hopper*, Str. 253, 258 (referred to in Bacon's Abridgment, Statute I, Sub. 7). The New River Water Act, was held to extend to places adjacent, although only the city of London was mentioned in it, "because all statutes made for the convenience of the public, ought to have a liberal construction." (*New River Co.* v. *Graves*, 2 Vern., 431 referred to in Bacon's Abridgment, Statute I, Sub. 7). It has always been enjoined, as a duty upon judges, to put such a construction upon a statute as may redress the mischief, and give life and strength to the remedy *pro bono publico*, according to the true intent of the makers of the law."

So in *Railroad Co.* v. *Austin*, 21 Mich. 407:—

Where the statute requirement was "a fence of the height and strength of a division fence required by law" and there was no provision as to "strength" required, the court say: "The word 'fence,' so employed here, must "be construed as including a mode of construction which "will give the fabric when completed such reasonable "strength as to confine or turn the animals usually re- "strained by fences in this country."

The same principle is enunciated in *Delzell* v. *Railroad Co.*, 32 Ind. 45.

Where the common council of the city of Indianapolis passed an ordinance requiring all railroad companies to fence their streets, and to do the work and keep them in repair to the satisfaction of the city engineer. In a suit brought against the railroad company for damages sustained by reason of the repairs being done in a negligent manner, and when the railroad company replied that the repairs were done to the satisfaction of the city's engineer, the supreme court said the railroad company could not "escape from liability from its own careless and improper "acts resulting in injury to others, by simply showing they "were satisfactory to an agent of the city authorities."

If statutes providing only for the protection of animals are thus liberally construed by the courts, how much stronger the reason for a liberal construction when the purpose of the law is the protection of men and women and innocent children from danger in the enjoyment of a public benefaction like the Lake Park. This park affords a centrally located breathing place to the most densely populated portion of Chicago.

But in reality the Illinois Central Railroad Company had put its own construction upon this ordinance long before the injury to the plaintiff. In the spring of 1872 (Rec. p. 26) it built a common five-board fence from about 300 feet north from the south end of the Lake Park, "on the western or inner line of the ground pointed out for its main track on the lake shore;" thus recognizing its obligation under the ordinance to build a fence on the east line of the park. If this fence had been continued only 600 feet further north, and kept up, there is no circumstance developed in the record which will lead a reasonable man to believe that the injury to the plaintift would have happened.

II.

THE MICHIGAN CENTRAL RAILROAD COMPANY IS EQUALLY LIABLE AS THE ILLINOIS CENTRAL RAILROAD COMPANY.

In all the respects which constituted these unfenced railroad tracks "inconsistent with the public safety," the Michigan Central contributed as much to make them a source of danger as the Illinois Central railroad. The Michigan Central R. R. Co. had used these tracks with the consent or license of the Illinois Central R. R. Co, for more than five years before the plaintiff was injured (Rec. p. 26) to the same or a larger extent than the Illinois Central. Having voluntarily made itself a party to the negligence of the Illinois Central R. R. Co. why should it not be held equally responsible in law for that negligence to the extent that injuries resulting from it were caused by the agency and were the act of the defendant? There is no reason why it should not, but every reason why it should be. Upon common law principles if A use dangerous machinery upon the property of B at a point where its use menaced the safety of the public in the enjoyment of any right or easement belonging to it, and C is injured thereby without fault on his part, C surely has his action for his damages against A. That is this case, and the authorities so establish the law.

In *Railroad Co.* v. *Rumbold*, 40 Ill, 143, where the Illinois Central company were using the tracks of the Toledo &c. railroad and an injury resulted from its trains the court say: "The gist of the action is negligence in not fencing the road as the statute requires, and if the fact was that a train of the Illinois Central road was moving on appellants' road, unfenced, as it was, the former company would be deemed the servants and agents of appellants, and this from motives of public policy and to protect the property of the people and public.

"It was the duty of appellants to have fenced the road, and public safety demands they should be held liable for all damages resulting from the neglect to fence it. And the same policy would require that the Illinois Central should be responsible for presuming to use the road of another company fenceless and unprotected, either company would be liable for the injury.

"The question has been heretofore considered and decided by this court in the case of the *Illinois Central Railroad Company* v. *Kanouse* 39 Ills. 272, wherein it was held, for an injury done on this same road, then called the Peoria and Oquawka Railroad Company, that it was the duty of that company to fence the road, but that the Illinois Central was liable for all accidents for presuming to use the road in its unsafe and unfenced condition.

"We do not see any difference, in principle, between the cases. Both depend upon the fact of the negligence of the appellants to fence the road."

This doctrine (that both roads are liable) has been approved in

Railroad Co. v. *Gerber*, 82 Ills. 632.
Railroad Co. v. *Lane*, 83 Ill. 448.
Railroad Co. v. *Barron*, 5 Wall., 104.
Railroad Co. v. *Brown*, 17 Wall. 445.

Railroad Co. v. *Kanouse*, 39 Ills. 272 is a case where the Peoria *etc.* R. R. Co. leased its line to the Illinois Central R. R. Co. and a horse belonging to the plaintiff was injured by a freight train of the Illinois Central company.

The statute required the road to be fenced. The point was made that the Peoria company and not the Illinois company was the proper party liable, if any one. The court say (p. 277):—

> "In the case before us, admitting it was the duty of the first party to the agreement to fence this road, they would be liable for this injury had they been sued, there can be no question. By the agreement, the second party, the plaintiff in error, undertook to use the road, defective as it was, and controlled the running of their trains upon it. The demands of public policy required that they should be responsible for all injury resulting from the use by them of the road while in such a defective condition. *They knew, when they made the agreement, the road was not secured by fences against these accidents, and they took it knowing the risk.*
>
> The law requiring railroad companies to fence their roads was enacted for the public good; but if the doctrine contended for by the plaintiffs in error should prevail it might not be productive of good. A company not responsible in damages might lease their entire road unfenced, to another company perfectly responsible, but who could claim immunity for the destruction of property by their trains, from the fact that they were not the owners of the road. *Pro hoc vice*, they must be deemed the owners and they controlled the powers that did the injury.
>
> The view taken by the Supreme Court of Vermont in the case of *Clement* v. *Canfield*, 28 Vt. 302, is in accordance with the view we have presented, and meets our approval. *Justice and the public good alike demand that a responsible party using the unfenced road of another company shall be liable for all damages resulting from the use of its own motive power upon it.*

In *Clement* v. *Canfield* 28 Vt. 302, where a statute made the "corporation and its agent" liable for all damages arising through the want of fences and cattle guards, and when, through the want of such cattle guards, a horse got upon the railroad tracks and was struck by an engine of the defendant (a leessee of the railroad company,) the court (Redfield, J.,) says, p. 305: * * "The declaration, alleging that the defendant became and was liable for all damages caused by this running the road, through defect of cattle guards, is well enough. This is the very liability which the statute imposes upon the company and upon all its agents, who run the road, or assist in doing so, whereby damages accrues. It is true that the statute imposes, primarily, no duty upon any one but the corporation, to build fences and cattle guards. But every one is made liable who runs the road, by or under the authority of the corporation, for all damages caused through defect of such cattle guards. It was therefore the duty of the defendant to see to it that such cattle guards existed, while he run the road, or to accept the other alternative of the statute by paying all damages caused through the defect."

Another similar case is that of *Tracy* v. *Railroad Company*, 38 N. Y. 433, where the defendant sought to avoid its liability because it was not the owner of the road, the court say:

> "The passage of this act being induced by public considerations, and its purpose being to protect the traveling public and the owners of domestic animals along the line of their road, it should receive a liberal construction to effectuate the benign purpose of its framers. A rigid and literal reading would, in many cases, defeat the very object of the statute, and would exemplify the maxim that "the letter killeth, while the spirit keepeth alive." Every statute ought to be expounded, not according to the letter, but according to the meaning; "*qui hæret in litera hæret in cortico.*" (Dwar. on Stat. 690) and the intention is to govern, although such construction may not, in all respects, agree with the letter of the statute. (Ploud, 205.) The reason and object of a statute are a clue to its meaning (Dwar. on Stat. 695), and the spirit of the law, and the intentions of its makers are diligently to be sought after, and the letter must bend to these (6 Bac. Abr. 384, 6th Ed. Lond. 1807; 1 Kent's Com. 465; Smith's Com. on Stat. §§ 709, 710.) The defendant in this case seeks to escape liability for the injury it has inflicted through the letter of the statute.

"The statute declares, "that every railroad corporation shall erect and maintain fences on the sides of their road," &c., and it is claimed in the case before us, that the road at the place where the cow in question was killed is not their road, but the road of the Troy Union Railroad Company, and consequently the defendant is not liable.

"The statute was designed to guard against the very mischief complained of against the defendants in this case; the operating of a railroad without the statute safeguard of having it fenced. These four operative railroad companies, for whose use this road was constructed, must all be held liable to respond to the obligations imposed by the general railroad act in regard to fencing."

"The Supreme Court of Vermont, in the case of *Clement* v. *Canfield* (28 Vt. 302), held, under a statute substantially like ours, that the lessee of a railroad, which was operating it, was liable if the fences were not maintained."

Under a somewhat similar statute in Michigan it was held in *Gardner* v. *Smith*, 7 Mich. 410 that a contractor of the road was liable for damages occasioned by the loss of a flock of sheep for the want of a fence along the road: and in *Railroad Co.* v. *Austin*, 21 Mich. 390 the defendant, a lessee of another company and using the tracks of such company, was held liable for damages for killing a horse, which strayed upon the track by reason of the want of such fences; and in a note by Redfield, in his Fourth Edition, to a case reported in 16 Barbour 315, *Parker* v. *Railroad Company* where the road was used by the defendants, by permission of the owning road and were not held liable for that reason, he says:—

"Perhaps the only question in regard to the soundness of this decision is, whether both companies are not chargeable with negligence, the one for suffering the road to be used, and the other for using it in that condition. This is the view taken of the law in *Clement* v. *Canfield*, 28 Vt. 302; *Ohio & Miss. Rail.* v. *Dunbar*, 20 Ills. 623" Red. on Railways, p. 589 (4th Ed.)

In *McCall* v. *Chamberlain*, 13 Wis. 637 in a case for damages, where the railroad was not fenced as required by statute and used by the lessee, the defendant, the court say:—

"Having imposed the duty, the liability for damages occasioned by neglect of duty is implied, though not expressed. The case of *Fawcett* v. *R. R. Co.*, 71 E. C. R. 609 fully sustains our conclusion, and is a complete answer to the objection that plaintiff's horses were trespassers on the lands adjoining the railroad.

* * * * * * * *

And we have no doubt that a lessee in possession of a road incurs the same liability as the company. He takes the road, if at all, subject to the duty imposed on the company for the benefit and protection of the public. *Linfield* v. *R. R. Co.*, 10 Cush. 562. There would be no safety in any other rule."

Whitney v. *Railroad Co.*, 44 Me. 362 and *Wyman* v. *Railroad Co.*, 40 Me. 162 do not establish a different doctrine, but simply hold that the owner of the road is not relieved from an action by reason of the accident having occurred while the road was in possession of other parties by its permission.

In *Webb* v. *Railroad Co.* 57 Me. 117, where a person was injured at a crossing through the neglect of a railroad company using the tracks of another company, the court say:—

"And we are clear that a railroad company when using the track and easement of another similar corporation for the purpose of running their own engines and cars with their own employes must be held to observe such precautions for the safety of the public at a crossing, as shall be fully equivalent to those which are required in the exercise of reasonable care and prudence at the hands of the corporation whose road they are using. AN OMISSION WHICH WOULD CONSTITUTE NEGLIGENCE IN THE PROPRIETOR OF THE TRACK, IS EQUALLY CULPABLE IN ANY PARTY THAT IS USING THE TRACK FOR THE SAME PUR-

POSES. *If they choose to omit such reasonable precautions they assume the risk and must abide the consequences of of so doing.*"

In Shearman and R. on Negligence § 466, it is said:

"Where a railroad company runs its trains over a track belonging to another company * * * the negligence of the company owning the track is to be imputed to the company running the trains, and the latter is absolutely liable under the statute for injuries to animals. In Illinois both companies are held responsible."

See also Redfield on Railways § 127, article 8 (page 488, Fourth Ed.)

The defendant had been using these tracks for upwards of five years prior to the accident to plaintiff; it must be presumed to have notice of the character of the surroundings from the lapse of time.

Railroad Company v. *Russell*, 91 Ills. 298.
Springfield v. *Doyle*, 76 Ills. 202.
Chicago v. *Fowler*, 60 Ills. 322.

Having therefore established that the Illinois Central Railroad Company was guilty of gross negligence in failing to perform a duty enjoined upon it by the ordinances of the city of Chicago, and by the common law without regard to the ordinance, as well as one it assumed and covenanted with the people of Chicago to perform for their security; and also shown, so far as it is possible to show in this or similar cases, that this negligence was the proximate cause of the plaintiff's injuries complained of, by showing a state of circumstances clearly indicating that conclusion; and having shown that the injury to the plaintiff was inflicted by the defendant's train upon the tracks of the Illinois Central road under circumstances which renders the defendant equally as culpable as the proprietor of the tracks for the negligence that caused the injury, we think we have made a case which entitles us to a hearing and a judgment, and certainly to a reversal of this judgment, unless the evidence clearly establishes such contributory negligence on the part of the plaintiff, or others whose acts might affect his right to recover, as under the law actually bars a recovery.

III.

DID THE PLAINTIFF CONTRIBUTE TO THE INJURY IN SUCH MANNER AS CHARGES HIM WITH NEGLIGENCE OR BARS HIS RECOVERY IN THIS ACTION?

The plaintiff was non sui juris.

The plaintiff was about eight years and nine months old; he had been *deaf* and *dumb* from the time he was two years and a half old; he had never been permitted by his parents (Rec. p. 27) to go out upon the streets "unless in their care or the care of his elder brother James; "he was refused admission to institutions for the education of the deaf and dumb, because he was too young" to be even capable of being taught; in the respect of being able to protect himself from any kind of danger he was as helpless as an infant of two years old; in the respect of being able to ask for protection, assistance or information much more helpless. To charge a child so circumstanced with responsibility for its acts would be a libel upon common sense. The boy from the nature of things could have no larger perception of danger from straying on railroad grounds, or across railroad tracks, or from an approaching or passing railroad train than the day he was born. The thunderous sound of the train so alarming even to children with all their faculties, was lost on him. A childish instinct induced him to go with other children; they went to the park and he went with them; they having a consciousness of danger avoided it, he having no such consciousness, following his childish impulses, unrestrained by any fence, wall or other sufficient works to secure him from danger, strayed off some twenty, thirty or forty feet from the line of safety and met this life-long mutilation.

All the authorities hold a boy of the plaintiff's age possessed of all his faculties *non sui juris.*

In *Railroad Co.* v. *Becker*, 84 Ills. 483, a case where a boy between *six* and *seven* years of age was killed in crossing a railroad track, the court say:—

"While the deceased was no doubt possessed of ordin-"ary intelligence and was as capable of using as much cau-"tion for his safety as other boys of his age; yet it is not "to be expected of a boy between six and seven years of "age, that the same care and caution will be used, for "personal safety, as will be exercised by a person of ma-"ture age, *and the law will not impute negligence to an* "*infant of such tender years.*"

In *Railroad Company* v. *Stumps*, 69 Ills. 409, where the plaintiff, a boy, attempted to *climb* on car in motion, the court say:

"The proof shows appellee was only 7 years old when he sustained the injuries. *He was too young to be charged with negligence* and could be held to no care other than such as a child of that age could be expected to exercise for its personal safety."

In *Railroad Company* v. *Hock*, 66 Ills. 238, where a boy 11 years old got on a moving train, the court say that a child of that age would get on a train, following his childish instincts, without comprehending the danger he was incurring.

In *Lammert* v. *Railroad Co.*, 9 Bradwell 388, where the plaintiff was a deaf and dumb boy about *ten* years of age, and who was passing upon the side of the cars with the knowledge of defendant's servants and who, it was claimed, was injured by carelessness of the defendant, and the defense was made that the boy was violating a provision of the statute in that he, being a minor, was unlawfully riding upon the cars of defendant, the court say:

> "The second and third counts aver that plaintiff was deaf and dumb, and of the age of ten years. He was therefore of an age when, even if possessed of all his faculties, he would be presumably incapable of committing an offense against the criminal code, and would be presumed ignorant of the law, as he is alleged to be in the third count. R. S. 1874, Ch. 38 §§ 280-283; *Angelo* v. *People*, 96 Ills. 209: Bishop on Crim. Law, Book 3 Ch. 13. If this were a prosecution against him for violating § 17 of Railroad Act, it would be necessary to show, if he is under fourteen, that he has the requisite capacity to commit criminal offense. This section 17 prohibits *any person or minor*, etc; but the language used must be construed in connection with the general provisions of the criminal code, and the term "minor" must be held to mean only such a minor as under those general provisions could commit an offense; otherwise any child, no matter how young or incapable of comprehending the nature of the act, might be convicted. It follows that under the averments of these two counts the case is to be considered without reference to this Section 17, for the reason that it is not applicable to one situated as was the plaintiff, *without proof of his capacity*."

Independent of this view, we think it must be apparent that if a child of the age and condition here described, ignorant as to the danger and legal nature of the act, is led to frequent the cars of the company by the well-meant though injudicious kindness of the employes, and is hurt through their negligence while they are performing services within the scope of their employment, the company cannot escape liability on the mere ground that the child was there without having "permission under the lawful rules and regulations of the corporation owning or managing the railroad."

In *Railroad Co.* v. *Gregory*, 58 Ill. 227, where the plaintift was a child five years of age, but whose mind was somewhat weak, the court says:—

"We cannot impute negligence to a child of such "tender years, especially of one of less than ordinary men-"tal capacity."

In *Mangam* v. *Brooklyn R. R. Co.* 38 N. Y. 455, where the plaintiff was 3 years and 7 months of age, the court say: "There is no reason, propriety or justice in the rule which would give no more protection to the one than to the other. The law in this class of cases is not subject to such a reproach. It says, the infant of three and a half years cannot be expected to exercise discretion and govern himself cautiously as regards dangers, and, consequently, he shall be held in law *non sui juris*, and none who have negligently or carelessly injured him shall be permitted to say he was personally negligent,and thereby contributed to the injury."

In *Gardner* v. *Grace*, 1 F & F. 359, where a child three and a half years old ran out on the street and was run over by a cart, the court say: —

"The doctrine of *contributory* negligence does not apply to an infant of tender years; to disentitle plaintiff to recover, it must be shown the injury was occasioned entirely by his own negligence."

In *R. R. Co.* v. *Mahoney*, 57 Pa. St. 189, the court say that no contributory negligence can be imputed to a child four years of age.

R. R. Co. v. *Ormsby*, 27 Gratt. 455 to a child 2 years and 10 months.

And it was so held in all the following cases:—

Prendergast v. *Railroad Company*, 58 N. Y. 652.

Wright v. *Malden*, 4 Allen 283; to a child 2 years old.

Kreigh v. *Wells*, 1 E. D. Smith 76; to a child one year and five months old.

Callahan v. *Bean*, 9 Allen 401.

Railroad Co. v. *Grable*, 88 Ill. 441; to a child 2 years and 4 months old.

Railroad Co. v. *Wolf*, 59 Ind. 89.

O'Flaherty v. *Railroad Co.*, 45 Mo. 70; to a child 2 years and 9 months old.

Mascheeck v. *Railroad Co.*, 3 Mo. App. 600; to a child 3 years old.

Railroad Co. v. *Huffman*, 28 Ind. ;287 to a child under 5 years of age.

Railroad Co. v. *Bowen*, 40 Ind. 545.

McGany v. *Loomis*, 63 N. Y. 104.

Railroad Co. v. *Caldwell*, 74 Pa. St. 421; to a child 5 years old.

Railroad Co. v. *Mahony*, 57 Pa. St. 187.

McLain v. *Vanzant*, 7 Jones and S. 347.

Lehman v. *Brooklyn*, 59 Barb. 234; to a child 4 years old.

Chicago v. *Starr*, 42 Ills. 174.

Meeks v. *Railroad Co.*, 52 Cal. 602; to a child six years old.

McMahon v. *New York*, 33 N. Y. 642.

Nagle v. *Railroad Co.* 6 W. N. C. 510; to a child 11 years old.

Railroad Co. v. *Vining*, 27 Ind. 513; to a child 7 years old.

Achtenhagan v. *Watertown*, 18 Wis. 331; to a child 13 years old.

IV.

THE NEGLIGENCE OF PLAINTIFF'S PARENTS IS NOT IMPUTABLE TO PLAINTIFF; EVEN IF THEY HAD BEEN PROVED TO HAVE BEEN NEGLIGENT.

The doctrine that the sins of the father shall be visited upon their children; and that because the fathers have eaten sour grapes the children's teeth shall be set on edge has been changed in our judicial system to something more consistent and humane.

Wharton on Negligence, Sec. 310, in discussing the question of the imputability of the parents' negligence to the child, says: "But putting aside these more technical objections, again the question meets us, could the defendant, discharging his duties carefully and diligently, have avoided injuring the child? If so,no amount of negligence by the child's parents is a defense, and such is the view of several authorative American courts." (See cases cited.)

Does this court entertain any doubt, in view of the facts disclosed by the record in this case, that if the Illinois Central, or Michigan Central, or any of the other railroads using the tracks when this injury was received by the plaintiff, had carefully and diligently discharged their duty by previously erecting "suitable walls, fences, or other sufficient works to secure persons and property from danger," between the park and the railroad grounds, the injury to this child would not have been avoided thereby? They had had more than five years' time in which to build it. Is there any doubt but that the plaintiff had a right to the finding of a jury upon these facts?

The case of *Hartfield* v. *Roper*, 21 Wend. 615, cited, frequently, as establishing the doctrine that the negligence of the parent should be imputed to the child, has been discarded in many cases and is not the law.

Thompson, in his work on Negligence, 1184, says concerning *Hartfield* v. *Roper*:--

> "A careful reading of this case will show that the rule which Mr. Justice CURRAN took pains to declare, was entirely unnecessary to the decision of the case, for upon the facts no other conclusion could have been reached."

In *Whirley* v. *Whiteman*, 1 Head. 610, the court say, of *Hartfield* v. *Roper*:

> "The decision is no less opposed to the current of authority upon the point than to any principle of reason and justice. It is literally to visit the transgressions of the parent upon the child."

In *Railroad Company* v. *Ormsby*, 27 Gratt. 455, the parents of plaintiff (2 years and 10 months old) lived close by the railroad track. The mother was an invalid and employed a servant to look after the children. The plaintiff escaped from her care and ran to the railroad track, was run over by a car and lost an arm.

The railroad company had left a flat car standing on the track all day close to plaintiff's house, and when the plaintiff was undoubtedly playing and by reason of the negligence in starting the car, the plaintiff was injured, although not seen by any of the employes of the company or others.

The court holds that the negligence of the parents, if any is not imputable to the child and disapproves of *Hartfield* v. *Roper* and say that plaintiff was too young to be guilty of negligence.

In *Robinson* v. *Cone*, 22 Vt. 213, the court say:—

"The case of *Hartfield* v. *Roper* is * * * altogether at variance with that of *Lynch* v. *Nurdin* and far less sound in principle, and infinitely less satisfactory, to the instinctive sense of reason and justice."

In *Lynch* v. *Lloyd* 31 Pa. St. 358, the court say:—

"The preponderance of both reason and authority" is against *Hartfield* v. *Roper*.

In *Smith* v. *O'Connor*, 48 Pa. St. 222, the court, after reviewing *Hartfield* v. *Roper* and other cases, say:

"We adhere, therefore, to the doctrine advanced in *Lynch* v. *Nurdin*, and heretofore recognized as the law in this state in cases cited rather than that adopted by the Supreme Court of New York, we regard it as founded in better reason and intrinsically just"

See also Field on Corporations, § 556.

In *Railroad* v. *Snyder*, 18 Ohio St. 399, the plaintiff, aged six years, in company with her sister, aged eleven, were crossing the railroad tracks near a depot where there were several tracks and side-tracks, but no highway—on their way to school—and where school children and others were in the daily habit of crossing and recrossing, without objection on the part of the company. The parents lived near by, and it was by their permission that the girls crossed and re-crossed the tracks alone at this point.

The children were standing upon one of the tracks while an express train was passing by, and a gravel train, which they could have plainly seen and stepped out of the way of it had they looked, backed down upon them at a slow rate, struck the younger, and inflicted the injury complained of. The negligence complained of and which upon to support a recovery, consisted mainly, in the fact that the brakeman on the gravel train was looking at the express train, when, if he had done his duty he would have been looking ahead, seen the girls, and stopped his train.

This is a very carefully considered case. The court discuss the question of negligence—of parents' negligence—and review most of the authorities at length, upon that point say (p. 415):

> "The foregoing are all the leading authorities on the subject. Upon careful review of them, we are inclined to follow those where the principle of imputed negligence has been denied. It follows, of course, that there is no error in this judgment. Indeed, it seems to us, the same result must be reached in the present case, whether the principle contended for, be adopted or neglected. The injury here, was within the ordinary and probable sequence of events, a result of the defendant's negligence. It might reasonably have been anticipated. There was danger of its happening, such as an ordinarily careful and prudent person might have apprehended, and would be likely to apprehend, as a possible result of any relaxation of vigilance and care. * * * We think, therefore, upon any view of the law of this case, that there was no error in the proceedings of the court below; and, for the reasons already assigned, we are constrained to place our decision upon the broad ground, that an infant cannot be deprived of his action against a wrong-doer, by reason of the concurring fault of a third person."

Without regard to the doctrine we are considering, the court say "the injury here was within the ordinary "and probable sequence of events, a result of the defen- "dant's negligence." That it might reasonably have been anticipated, and that an ordinarily careful and prudent person would have apprehended it as a result likely to happen.

If such reasoning is to be regarded as true in that case, how much more applicable it is in this case. This result not only might have been apprehended by an ordinarily prudent person, but clearly was apprehended by the Common Council of Chicago, before the road was built. That body provided against it by an ordinance requiring the railroad to do as a matter of duty under the law, what an ordinarily prudent person would have done without it. Both the law and the dictates of ordinary prudence were here disregarded.

In *Mangam* v. *Railroad Co.*, 38 N. Y. 455, where a child four years old escapes through an open window coming to within four feet of the ground.

The court discusses and approves the cases of *Daly* v. *Railroad Company*; *Robinson* v. *Cone* and *Snyder* v. *Murdin*, and say (p. 461):

> "The child being *non sui juris*, cannot, personally, be held to any rule of conduct in regard to such negligence. He is incapable, in law, of doing any act that will deprive him of his action for injuries negligently inflicted upon him by others. His parents or other custodian cannot be chargeable with negligence for his conduct in the street, where the child has escaped from the house, without their knowledge or negligence. Any other rule would be unjust and unreasonable, as affording no protection to helpless infants against injuries from the negligent and careless conduct of others. In short, it would make them little less than outlaws in the street, unless attended by their parents or other lawful custodians. They are not beyond the pale of the law when in the streets. Common humanity is alive to their protection, and the law, both in reason and justice, and out of compassion to their weakness and inability to protect themselves, should throw a broader shield of protection around them against injuries from the careless conduct of the strong, than it affords to an adult, who is capable of self-defence and protection."

In *Isabel* v. *Railroad Company*, 60 Mo. 474, the road was constructed through plaintiff's yard and had no fence between the house and track. The child was in the care of its grandmother, its own mother being dead. She kept it in the house as much as she could, but it escaped and went upon the railroad track and sat down. The child was two years old. It was mistaken by the engineer for another object and was killed.

The court say:—

"Whilst some negligence might have been attributable to those who had charge of the child, if it was not the proximate cause—a recovery is not barred. People in the situation in life of those who had the custody of the child, cannot always attend to it strictly; and if it escapes from them unawares, it must not be injured, simply because it so escapes."

In *Kay* v. *R. R. C.*, 65 Pa. St. 269, the plaintiff, a child 19 months old, lived in a shanty with her parents close to the track. The parents were poor laboring people. The mother was busy washing for herself and others. She went across the track to the canal for water, carrying the child upon her arm on her return. She sat the child down before a chair with some sugar in it, and again commenced washing. In a few minutes the child was missing. It had run upon the track and was killed.

The court say: "The doctrine which imputes the negligence of the parent to the child in such a case as this, is repulsive to our natural instincts, and repugnant to to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian has placed a child in a position of danger, necessarily requiring the care of the adult to be constantly exercised, as where a parent takes a child into the cars, and by his negligence suffers it to be injured by straying off upon the platform. But where a mother, toiling for daily bread, and having done the best she could, in the midst of her necessary employment, loses the sight of her child for an instant, and it strays upon track, with no means to provide a servant for her child, why should the necessities of her position in life attach to the child and cover it with blame? When injured by positive negligence, why should it be without redress? A negligent wrong is done; it is incanarily prudent person, but clearly was apprehended by the Common Council of Chicago, before the road was built. That body provided against it by an ordinance requiring the railroad to do as a matter of duty under the law, what an ordinarily prudent person would have done without it. Both the law and the dictates of ordinary prudence were here disregarded.

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The court say: "The doctrine which imputes the negligence of the parent to the child in such a case as this, is repulsive to our natural instincts, and repugnant to to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian has placed a child in a position of danger, necessarily requiring the care of the adult to be constantly exercised, as where a parent takes a child into the cars, and by his negligence suffers it to be injured by straying off upon the platform. But where a mother, toiling for daily bread, and having done the best she could, in the midst of her necessary employment, loses the sight of her child for an instant, and it strays upon track, with no means to provide a servant for her child, why should the necessities of her position in life attach to the child and cover it with blame? When injured by positive negligence, why should it be without redress? A negligent wrong is done; it is incapable of contributing to it—then why should the wrong not be compensated?"

In the late case of *Railroad Company* v. *Moore*, 16 Cent. L.J. 273, where a child six years old was sent across the railroad track by its mother upon an errand, this question is again fully considered, and the court say:—

> "The rule in this matter is so well and strongly expressed by Brickell, C. J. in the case of *Government Street R. R.* v. *Hanlon*, 53 Ala. 82 that we here insert and adopt it. He says: "If a child should be abandoned by its parents, thrown out as a mere waif on society, it is not possible, it seems to us, that one who negligently inflicts on it an injury, can be heard to invoke the parent's crime to shield himself from liability for the wrong. It seems repulsive to our sense of justice that because the parent is negligent of the child others may with impunity be equally negligent of its helplessness and indifferent to its necessities. The law may not compel active charity for the relief of the child, but it does shield him from positive wrong or neglect. Without inquiring, therefore, whether negligence can be imputed to the parents of the plaintiff, because they permitted him to go into a crowded street of a populous city, unattended, (except by one probably not capable of protecting him) we do hold that if it were negligence, it cannot be charged to the plaintiff or affect his right of recovery in this case."

The case of *R. R. Co.* v. *Hanlon*, 53 Ala. 70, just referred to, is a case where the plaintiff, three and a half years old, in company with his brother two years older, were upon the street at a crossing and the plaintiff was run over by a street car through the negligence of the driver. See also

Chicago v. *Major*, 18 Ills. 349.
Walters v. *Railroad Co.*, 41 Ia. 75.
Birge v. *Gardner*, 19 Conn. 507.
Daley v. *R. R. Co.*, 20 Conn. 591.

While we have thus quite fully presented the authoities upon this point we do not think it arises in this case, as we think the record shows that the parents not only were not guilty of negligence contributing to the injury, but that the care exercised by them, over the plaintiff on the day of the injury, was largely in excess of the care ordinarily exercised by parents of their social condition over their children under similar disabilities. They never let him go out unattended; on the day of the injury he was attended as usual. His attendant was told (Rec. p. 27) "not to leave him, and not to leave the corner of Van Buren street and Wabash avenue," and when James said plaintiff was in the candy store (p. 28) "plaintiff's father then told James to go and get his brother and bring him in and both of them stay in the house until their parents came back." His parents had every reason to suppose plaintiff was in their house at the time the injury occurred. The record discloses that they not only exercised ordinary care, which is all the law requires in any case, but that they really exercised the utmost diligence, which is more than the law requires, in the case of this child, and even in the exercise of such care when he was injured.

But even if it were possible to entertain a doubt upon this point, still the judgment must be reversed because the question is one for the jury. Neither science nor legal knowledge is involved in it. It is purely a question of fact which the court had no right to assume to determine.

V.

THE NEGLIGENCE OF PLAINTIFF'S PARENTS A QUESTION FOR THE JURY.

In *City of St. Paul* v. *Ruby*, 8 Minn. 154, where child four and a half years old was injured by reason of a defective sidewalk. There was no evidence to show what the child was doing at the time it was injured. The court after citing *Robinson* v. *Cone; Lynch* v. *Nurdin; Birge* v. *Gardner: Oldfield* v. *R. R. Co.*, say:—

"From an examination of these and other analagous cases that might be cited, we are satisfied there is no presumption in law of negligence on the part of the child or its parents, in the bare fact that it is found in the street or upon the sidewalk without an attendant; but that it is a question for the jury or referee to determine under all the circumstances of the case, whether there was negligence on the part of the child or its parents, such as to preclude a recovery for the injury received. And, indeed, the cases above cited, go farther than is requisite to sustain this report on the facts stated by the referee, for they hold that the law does not presume negligence, even when parents knowingly permit the child to be on the street unattended; much less will it be presumed when, as in this case, the fact appears that the child was not accustomed to being on the street unattended, and in the instance in which the injury occurred, was there without the knowledge, and consequently without the permission of its parents. There is certainly nothing in the report, from which this court, as matter of law, can find want of ordinary care and prudence on the part of the child or its parents, and we cannot disturb the judgment below, except for errors of law, appearing of record.

In *Johnson*, Adm'r. v. *Railroad*, 49 Wis. 529, the plaintiff, six years old, was playing upon the track where it crossed the public highway, in Ft. Howard. Children continually crossed the track, on their way to school, at this place. The child's parents, however, lived on the same side of the track as the school. The boy was playing with other children.

There was a *non suit* entered in the court below.

The court say:—

"This was the only witness sworn who was able to state where the boy was when he was struck by the engine, and she distinctly says that he was in the middle of the road, right in the track between the two rails." Bu he was upon the highway, where he had a lawful right to go, and while there, yielding to a "childish instinct," or impulse, had stopped for a moment to play with something in the highway which attracted his attention. And had the engineer been vigilant and careful, and looked out of the window of the locomotive, as he approached the crossing, it is barely possible he might have seen the boy in time to have saved his life, by stopping his engine. It seems needless to remark that the operation of a railway, over and along public streets in a village or city, is necessarily attended with great peril to human life and property, especially under the circumstances disclosed in the testimony in this case; consequently the utmost care should be exercised by the servants of the corporation to avoid injury. *Butler* v. *Railroad*, 28 Wis., 487.

"So in respect to the other question, namely: whether the boy or his parents were guilty of contributory negligence; this also should have been submitted to the jury upon the evidence. Many children of as tender age as this boy, are permitted by their parents to be in the public streets, or sent alone to school. It cannot be held, as a matter of law, that in such cases, parents or guardians fail to exercise due care and prudence in looking after their children or wards.

"Legal negligence is the omission of such care as persons of ordinary prudence exercise, and deem adequate to the circumstances of the case." Grover, J., in *Mangam* v. *Brooklyn R. R. Co.*, 38 N. Y. 455-7. It was for the jury to say, whether the parent or this child —regard being had to his age and intelligence—used that degree of care required under the circumstances. *Thurber* v. *Railroad*, 60 N. Y. 326. *Ewen* v. *C. & N. W. R. R. Co.*, 38 Wis. 614."

This doctrine is so well established that it is useless to quote further from the decisions, but we cite the following additional authorities:—

Mangam v. *Railroad Company*, 38 N. Y. 455; allowing child four and a half years to escape.

Lynch v. *Smith*, 104 Mass. 52; whether plaintiff's parents were guilty of negligence in sending a boy four and a half years of age, to school alone.

Mulligan v. *Curtis*, 100 Mass. 512; whether parents were negligent in sending out child three and a half years old, under care of a brother nine years of age.

O'Flaherty v. *Railroad Company*, 45 Mo. 70; plaintiff sent child two years and eight months old across the street, in care of sister about eight years old, to play. The younger child escaped from care of sister.

Isabel v. *Railroad Co.*, 60 Mo. 474; leaving child twenty-one months old with grand-parents.

Railroad Company v. *Snyder*, 18 O. St. 399; sending a girl six years old to school, in care of a sister aged eleven years.

Meeks v. *Railroad Company*, 56 Cal., 513; where parents lived near railroad track, in allowing boy six years old to play out doors.

Karr v. *Parks*, 40 Cal. 188; in sending child five years old out in the street, in care of a sister eleven years old.

McMahon v. *Railroad Co.*, 49 Md. 438; in sending child five years and nine months old to store alone, where store was across railroad track.

Drew v. *Railroad Company*, 26 N. Y. 429; sending child eight years old to school, alone.

Railroad Company v. *Kelley*, 31 Pa. St. 372; sending child nine years old across railroad track.

Townley v. *Railroad Company*, 53 Wis. 626; allowing child seven years old to walk upon railroad track to and from school.

Prendegast v. *Railroad Company*, 58 N. Y. 652; allowing child two years to escape.

Fallon v. *Railroad Company*, 64 N. Y. 13; sending child five years old into yard to play, whence it escaped into the street.

Chicago v. *Mayor*, 18 Ills. 361; in allowing child four years old to play on the street.

Schmidt v. *Railroad Co.*, 23 Wis. 186; in allowing child eighteen months old to escape.

Railroad Company v. *Pearson*, 72 Pa. 169.

Kay v. *Railroad Company*, 65 Pa. St. 269; allowing child nineteen months old to escape.

Railroad Company v. *Lang*, 75 Pa. St., 257.
Railroad Company v. *Fryer*, 30 Md. 47.

Rauch v. *Lloyd*, 31 Pa. St. 358; in sending a boy nine years old across railroad track.

Walters v. *Railroad Company*, 41 Ia. 71.
Railroad Co. v. *Ormsby*, 27 Gratt. 476.

Williams v. *Railroad Co.*, S. R. 9 Ex. 157; sending a child four and a half years out alone upon an errand.

Railroad Co. v. *Moore*, 16 Cent. L. J. (Texas) 273; in sending a boy six years old across railroad track alone, upon an errand.

Railroad Company v. *Bohn*, 27 Mich. 461; in allowing child four and a half years to go upon a street car, in company with an older brother.

VI.

THE PLAINTIFF'S PARENTS WERE NOT GUILTY OF ANY NEGLIGENCE.

The evidence shows that the plaintiff's parents never allowed him to go out unless in the care of themselves or his older brother James. (Rec. p. 27), and on the day in question he went out in the care of his brother James.

The plaintiff's father, a plasterer, was called away during the entire week, and the mother, a portion of the time. When working out, they left plaintiff in the care of his older brother in their house on the 3d floor of the tenement where they lived. They always (Rec. 27) had some one in charge of him when he went out. In this, they used all care that persons in their situation could be expected to take of their children.

In *Railroad* v. *Becker*, 84 Ill. 483, where a boy between six and seven years of age was sent in the care of an older brother to Sunday school, and was killed in crossing the railroad tracks, the court say: "Nor can "it be said the parents of deceased were guilty of negli-"gence in allowing the deceased to be upon the street. "He was placed in the care of an older brother and the "two sent to Sabbath school. Had he been sent alone "there might have been more ground of charging them "with negligence; but the parents used as much precau-"tion as could have been expected, and as much as is "usually observed by parents with their children."

In *Railroad Co.* v. *Gregory*, 58 Ill. 227, where the parents of the plaintiff lived near the railroad track in the village of Brighton, the mother went out to milk, leaving the plaintiff aged five years old in the care of an older sister, aged about eight years.

The court say:—"Is, then, the mother chargeable "with negligence? She seems to have exercised all rea-

"sonable care. The same rule should not be applied to "persons depending upon their labor for support and to "those whose means enable the mother of the family to "give a constant personal attention to the care of the "children or employ a nurse for that purpose."

In *Railroad Co.* v. *Bumstead*, 48 Ill. 221, them other of a child 4 years of age, left the child with his sister, 14 years of age, and visited a neighbor, the court say:—

> "The next point by appellants is, that the parents of this child were guilty of great negligence in leaving him with his young sister. We cannot perceive, admitting it is a duty of the most imperious obligation resting upon parents, to use vigilance in the care of their offspring of tender years, that the parents of this child were wanting in this requirement. A mother cannot be always, at all hours, with her child, nor is there any necessity she should be, nor is it practicable. She must perform her accustomed avocations, and in one moment a child of four years of age may escape from her notice; it cannot be otherwise. The parents of this boy, the evidence shows, were in a very humble walk of life, who had, the mother especially, something more important to do than to watch her child, lest he came to harm. She had to contribute her labor to feed and clothe him, and it is unreasonable to demand she should have no other employment than to guard her child from danger. Leaving the child with his sister, a girl of fourteen years of age, and who appears, from her testimony, to be intelligent, and affectionate, was not negligence. It was unavoidable, and she was trustworthy, and competent to take charge of the child. What would be the public judgment of a rule of law which should forbid a mother to leave a child, four years of age, with his sister of fourteen, while the mother was providing for their sustenance, *or enjoying herself by a short visit to a neighbor?* Such a rule would not receive the sanction of any court, and is not to be found in any adjudged case, or in any legislative enactment, and has no reason in its favor. There was no negligence of the mother."

This case is "an all-fours" with the case at bar as to the care required of the parents.

In *Chicago* v. *Hesing*, 83 Ill. 204, the deceased was less than four years old, and while his mother was engaged with her ordinary labor, he left the house and, in some manner not explained, fell into a ditch, constructed by the city, and was not rescued until life was extinct, the court say:—

> "No negligence is imputable either to the deceased or his parents. The child was too young to observe any care for personal safety, and its parents omitted no reasonable care for its protection. The parents of the child are laboring people, and had to be constantly employed. When the accident occurred, the father was at work in a lumber yard not far distant, and the mother was engaged in her usual domestic affairs. The law has not required that persons in their station in life shall keep a constant watch over their children, *nor can the want of such care be imputed to them as negligent conduct.* The former decision of this court are conclusive on this branch of the case."

Says SHARSWOOD J., in *Railroad* v. *Pearson*, 72 Pen. St. 169.

> "That to say it is negligence to permit a child to go out and play without a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendants, and would amount to a denial of those blessing to the poor:"

In *Chicago* v. *Major*, 18 Ill. 349, a child 4 years old fell into a tank constructed by the city. The court say:— "This instruction was asked, and, if given, would have been understood in reference to the particular facts of this case, and would have been equivalent to instructing the jury that this child had no business in the street, and that the city was not liable for negligently leaving the tank in such a condition as to endanger the lives of such children in the street. Such, we apprehend is not the law, and the court properly declined so to instruct the jury. A large majority of children living in cities depend upon the daily labor of both parents for subsistence, and these parents are unable to employ nurses, who may keep a constant and vigilant eye momentarily upon their children; and we cannot hold, as a matter of law, that every time a child, four years of age, steps into the street unattended the mother is guilty of such negligence as would authorize every reckless or careless driver to run over and trample it down with impunity, or as would authorize the city to expose traps and pit-falls in which a child may be drowned or maimed. Such a rule of law ought to depopulate a city of all its laboring inhabitants."

In *O'Flaherty et al* v. *Railroad Co.*, 45 Mo. 70, a child 2 years and eight months old, was sent across the streets in the city of St. Louis, in care of an older sister, to play, it escaped from her care, and was run over by the street cars.

The court says:—

"I think it may be stated as a sound proposition that to constitute negligence in the parents there must be an omission of such care as persons of ordinary prudence exercise and deem adequate for the required purpose. In the present case it appears that the unfortunate little child was never permitted to go out on the street alone, unattended, but it was frequently sent out under the care of its sister. Although the sister was but eight years old, she might have been entirely adequate to afford it protection under ordinary circumstances. It is the only attendance many people are capable of affording their children. To say that it is negligence to permit a child to go out to play unless it is accompanied by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy who are able to employ such attendants, and would amount to a denial of these blessings to the poor."

In *Walters* v. *Railroad Co.*, 41 Ia. 71, the court below gave the following instructions: "If, however, the father of the deceased was, at the time of the injury, a laboring man, and its mother was confined to her room by sick ness, and they had placed the deceased in charge of a proper person to take care of and watch over it, with fence and gates properly secured and fastened, this would be sufficient care." The Court say: "It is objected to this branch of the instruction that the duty to keep a child out of danger requires as much exercise of care by a person in one condition in life as by a person in another condition. This branch of the instruction is not objectionble. Law, as a rule of human conduct, should be adapted to human necessitiet and conditions. In so far as it fails of such adaptation is becomes unjust and unreasonable. It certainly cannot be claimed that a laboring man, or his wife, though confined to her room by sickness, must give their personal attention and oversight to their infant child, in order to avoid the imputation of negligence. Certainly when they provide fences and gates properly secure and fastened and place the child in care of a proper person to take care of and watch over it, they can not be personally charged with negligence."

In *Frick* v. *Railroad Co.*, 75 Mo. 542, a child 2 years of age escaped from home, unknown to his parents, and ran upon the railroad track and was injured, the court say:—

"It is, perhaps, sufficient to say that the evidence tends to show that the child temporarily escaped from home and strayed upon the railroad track, without the knowledge or consent of its parents. It does not appear how it got upon the track, or that it was ever known to have been there before, or that its absence from home had been discovered when the accident occurred. Its father, the plaintiff, was a butcher, and at the time was at his shop in another part of the city; while its mother, besides the care of her household duties, at the time had charge of an infant about one month old, and the family were without servants or other help. It cannot, therefore be held, as a matter of law, that the plaintiff actively permitted or consented to his child's going upon the railroad track; or that he failed to exercise such care for the safety of his child as ordinary prudent persons, in his situation, deem proper and sufficient in like circumstances."

In *Morgan* v. *Illinois, etc. Bridge Co.* 5 Dill. 96, a boy 4 years old strayed from his home, about four blocks away, and fell into an excavation left unguarded by the defendant. The court say, p. 101:—

"The natural instincts and habits of children lead them to play; and it is scarcely possible, and certainly not practicable, to keep them entirely off the street, or under constant supervision. The injury here was not caused by any person or agency in the lawful use of the street. What right has the tunnel company to leave a dangerous pitfall in the public way, and then to insist that all the children in the neighborhood shall be imprisoned or kept off the street?"

* * * * * * * * * *

It is not shown that the child was in the habit of going there; and as the receiver's negligence is positive and actual, and was the direct cause of the injury, and as the *onus* to establish the defense of contributory negligence is on the receiver (*Railroad Company* v. *Gladmon*, 15 Wall. 401)and as they have failed to show such negligence, they are liable."

* * * * * * * * * *

The tunnel company has no more right, by having a dangerous excavation in the public ways, unnecessarily to impose upon the rich the duty to employ an attendant for their children than to impose upon the poor the impracticable duty of never allowing their children to escape from sight, lest they may be injured by its wrongful and illegal act."

We ask the attention of the court especially to the argument of the foregoing case. What right had the Illinois Central railroad to leave its tracks unfenced along this park, and then to insist that all the children of the neighborhood shall be kept from the enjoyment of it?

It is not shown that the plaintiff had ever been there before. The negligence of the railroad is positive and actual, and was the direct cause of the injury. The burden of proof of plaintiff's negligence is on the defendant. It has made no such proof and is liable.

Railroad v. *Gladmon*, 15 Wall. 408.

The Illinois Central railroad had no right by leaving its tracks unfenced along the park, or the defendant by using the tracks in that condition, to impose upon the poor the impracticable duty of never allowing their children to escape from sight, or to visit or play in the park lest they may stray upon the *undistinguished* grounds of the railroad and be injured by reason of the wrongful and illegal act if the railroad company in neglecting to erect necessary barriers between the park and its grounds.

In *Smith* v. *Railroad Co.*, 25 Kas., 738, where child two years old escaped from care of its parents.

The court say:—

"The defendant seems to admit that the plaintiff himself was too young to be charged with contributory negligence; and the question, whether the parents and custodians of the plaintiff were guilty of contributory negligence, may also be eliminated from the case; for, as before stated, the question was not submitted to the jury, but was decided by the court, and therefore, unless we can say, as matter of law, that they were guilty of negligence, we cannot say that the court below decided the case correctly, as to this question; that is, unless we can say that the failure on the part of the parents of the plaintiff to keep him away from the railroad track was *per se* culpable negligence, contributing to the injury, we cannot say that the court below committed no error in taking the case from the jury—because of any supposed negligence of the parents of the plaintiff in permitting him unconsciously to enter upon the railroad track. We cannot say that the parents were thus guilty of negligence. Indeed, if we were examining the case, as a juror must examine it, and as a question of fact instead of, as a question of law, as we are now considering it, we do not think that we could say that the parents of the plaintiff were guilty of culpable negligence. The parents were in moderate circumstances. The father was a miner, and was working, at the time of the injury, in a coal shaft, at the place where the car that did the injury was loaded; and the mother was at home attending to her household affairs; and the boy left home, without her knowledge, only about three minutes before he was injured. Ordinarily, the parents were very careful to keep their children away from the railroad track, and it was without their permission and against their will that their children at any time went upon the track. This would seem to be sufficient to exempt them from the charge of negligence, even if the question were to be viewed, as a question of fact, and as a jury should consider it, and not as a question of law, where we are asked to decide affirmatively that the parents' acts were legal negligence. The court below certainly erred, if it decided this question in favor of the defendant."

In *Isabel* v. *Railroad Company*, 60 Mo. 483; where a father, his wife being dead, left the deceased a child twenty-one months old in the care of its grandmother.

The court say:--

"The people in the situation in life of those who had custody of the child, cannot always attend to it strictly; and if it escapes from them unawares, it must not be injured, simply because it so escapes."

In *Karr* v. *Parks*, 40 Cal. 188; it is held that, unless there is some great danger to be apprehended, the parent is not guilty of negligence in allowing a child ten years old to be upon the street.

See also *Mangam* v. *Railroad Co.*, 38 N. Y. 455; where a child four and a half years old escapes from its mother, engaged in washing.

Prendegast v. *Railroad Co.*, 58 N. Y. 652; where child two years old escaped from its mother who was engaged in wasning.

Railroad Co. v. *Bohn*, 27 Mich. 461; where the court held that it was not negligence on the part of a mother to permit a child four and a half years old to go in company with an older brother, twelve and a half years old, upon a street car.

In view of the law, therefore, it is evident the plaintiff's parents used greater diligence in the case of their son, than the courts in any described case have required, and they cannot be charged with negligence.

VII.

THE CARE REQUIRED OF A CHILD IS TO BE DETERMINED BY THE JURY, UNDER THE CIRCUMSTANCES OF EACH CASE, CONSIDERING THE CHILD'S AGE, INTELLIGENCE AND CAPACITY.

This proposition is too well settled to require extended argument. It is so laid down in the text books.

Shearman, in his work on Negligence, says:—

"Sec. 49. The opinion of judges on the point have "been conflicting, but the weight of authority in the "United States is overwhelmingly, in favor of holding an "infant only to such degree of care, as is usual, among "children of his age."

See also Wharton on Neg. (2d Ed., § 310, 322, 420).

Field on Corporation, § 556.

This court has passed upon this question in *Railroad Co.* v. *Gladmon*, 15 Wall. 401, where a boy, 7 years of age, ran across the track in front of the horses attached to a street car, and was injured.

The court says: –

"The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

And have re-affirmed this doctrine in *Railroad Company* v. *Stout*, 17 Wall. 657, where they say:—

> "It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case."

In *Rauch* v. *Lloyd*, 31 Pa. St. 358, a boy six years old, went with another boy about his own age for some shavings to a carpenter shop, a short distance from his home and across the railroad tracks; upon returning he found a long train of cars blocking the street, the plaintiff and his companion attempted to creep under the cars, and while doing so the cars started and plaintiff's legs were crushed.

The court say:—

> "The third and final subject of consideration relates to the instructions touching the negligence of the plaintiff. I quite agree with the learned judge, that if the plaintiff had been an adult of ordinary prudence and discretion, he would have no right of action; for, however, blameworthy the defendants may have been in leaving their cars on the crossing, common prudence would have restrained him from attempting to pass under them, and an adult would be bound to use common prudence.
>
> "But, that the same rule should not be applied to a child of tender years, was so successfully demonstrated by Lord Denman, in *Lynch* v. *Nurdin*, 6 Ad. & E. 30 and 41 Eng. Com. L. R. 422, and by Ch. J. Redfield in *Robinson* v. *Cone*, 22 Vermont R. 224, that I shall content myself with referring to their reasonings. Nor am I unmindful of the counter current of authorities in New York, 21 Wend. 615, 6 Hill 592, 4 Comstock 359; but the preponderance of both reason and authority will be found favorable to the two adjudications first named.

That every case is to be determined by its own circumstances, and that children are to be held responsible only for the discretion of children, seem self-evident propositions. A blind man is not bound to see, a deaf man to hear, nor a lunatic to reason; and yet they have a right to redress for injuries inflicted by the negligence of others. Children of tender years are not responsible to the law either criminally or civilly; and that for want of discretion. Of what imprudence was this little boy guilty?

* * * * * * * * * *

"With another case from Huntington County before us at this moment, where a boy under similar circumstances passed under instead of going around a train of cars, it is impossible for us to consider such conduct unnatural. If he had gone out of his track to place himself under the cars, it might be accounted rashness even in a child; but pursuing his highway, he may have supposed that the men who placed cars there expected him to pass under them. Considering his age and all the circumstances of the case, we see nothing that would justify the imputation of negligence or imprudence. He acted like a child, and he is not to be judged as a man."

In *Railroad Co.* v. *Kelley*, 31 Pa. St. 372, the plaintiff was at work on the Broad Top Railroad, near Huntington, and his son James, a lad nine years of age, was sent to him with his dinner. The father sent him into Huntington for some tobacco, and, returning by the turnpike, the boy found the crossing obstructed by a train of defendant's cars. He attempted to creep under them, when the train started and injured one of his feet so as to render the amputation of it necessary. The case is similar to *Rauch* v. *Lloyd*, and holds that the negligence of parent and child should both be left to the jury.

As this court has passed upon this point it is needless to quote further from the authorities.

We cite the following additional cases, as fully sustaining this proposition:

Kerr v. *Forgue*, 54 Ills. 482; where boy 11 years old was injured by counter on sidewalk.

Railroad Co. v. *Gregory*, 58 Ills. 226; child between 4 and 5 strayed on railroad track and injured.

Railroad Co. v. *Becker*, 76 Ills. 27; a boy 16 years old was killed while crossing railroad track at street crossing.

Railroad Company v. *Murray*, 71 Ills. 601; girl 7 years old crossing track.

Weick v. *Lander*, 75 Ills. 93; a boy 12 years injured by falling from wagon on account of obstruction in street.

Railroad Company v. *Delany*, 82 Ills. 198; a boy 9 years old crossing track at street.

Railroad Company v. *Becker*, 84 Ills. 483; a boy 16 years old was killed while crossing railroad track at street crossing.

Hougsburger v. *Railroad Company*, 33 How. Prac. 105; child 7 years old crossing horse car track.

Mangam v. *Brooklyn Railroad Company*, 38 N. Y. 455; a child 7 years, 7 months, injured while crossing track.

O'Mara v. *Railroad Company*, 38 N. Y. 445; a child 11½ years was killed by engine.

Thurber v. *Railroad Company*, 60 N. Y 326; boy 9 years old crossing railroad track in front of street car.

McGovern v. *Railroad Company*, 67 N. Y. 417, boy 8 years crossing R. R. at street.

Oldfield v. *Railroad Company*, 14 N. Y, 310, a girl 7 years struck by cars on street crossing.

Ihl. v. *Railroad Company*, 47 N. Y. 317; a child 3 years and 2 months killed while crossing track.

Prendergast v. *Railroad Company*, 58 N. Y. 652; a child 2 years old killed on railroad track.

Fullon v. *Railroad Company*, 64 N. Y. 13; a boy 5 years of age injured by street car.

Byrne v. *Railroad Company*, 83 N. Y. 620; a child 11 years old crossing track.

Oldfield v. *Railroad Company*, 3 E. D. Smith 103; a girl between 6 and 7 years old struck by cars on street crossing.

Walters v. *Railroad Company*, 41 Iowa; a boy 2 years of age was upon the track, and was killed by freight train.

McMullin v. *Railroad Company*, 46 Ia. 231; a boy 9 years old was on railroad bridge, and thrown from bridge by engine.

Johnson v. *Railroad Company*, 49 Wis. 529; a boy 6 years old was killed by a train while crossing a city street.

Schmidt v. *Railroad Company*, 23 Wis. 188; a child 18 months old got upon the track, in consequence of the failure of the railroad company to erect a fence, and lost an arm.

Railroad Company v. *Hendon*, 53 Ala. 70; a child 3½ years of age was run over by street car on crossing.

Elkins v. *Railroad Company*, 115 Mass. 190; a boy 10 years of age was injured by train while crossing track in buggy.

Lynch v. *Smith* 104 Mass. 52; a child 4½ years old was injured by the negligent driving of a hackman.

Townley v. *Railroad Company*, 55 Wis. 626; a girl 7 years of age had foot crushed by train.

Kline v. *Railroad Company*, 37 Cal. 400; whether a boy 16 years old was negligent in jumping from cars.

Marks v. *Railroad Company*, 26 Cal. 513; boy 6 years playing on railroad track.

Birge v. *Gardner*, 19 Conn. 509; a child 7 years had legs broken by falling of gate.

Daley v. *Norwich & W. R. R. Co.* 26 Conn. 591; a child less than 3 years was injured on railroad track.

Robinson v. *Cone*, 22 Vt. 213; a boy 3 years of age injured while sliding down hill on sled, through negligence of man driving on highway.

Railroad Company v. *Lewis*, 79 Pa. St. 33; a boy 9 years old killed while crossing railroad track.

Railroad Company v. *McDonald*, 43 Md. 534; a child about 3 years old was injured by street car.

Railroad Company v. *Fryer*, 39 Md. 47; a girl 5 years of age run over by street car and killed.

McMahon v. *Railroad Company*, 39 Md. 438; a boy 6 years old was run over and seriously injured by cars.

O'Flaherty v. *Railroad Company*, 45 Mo. 70; a girl 2 years 8 months old killed by street cars.

Boland v. *Railroad Company*, 36 Mo. 490; a child 2 years of age was killed by horse car.

City of St. Paul v. *Kirby*, 8 Minn. 169; where a child fell from sidewalk which was in unsafe condition.

Railroad Company v. *Snyder*, 18 O. St. 399; a girl 6 years of age injured by gravel train.

Railroad Company v. *Fitzsimons*, 22 Ka. 686; a boy 12 years old was injured while on turn-table.

Railroad Company v. *Bohn*, 27 Mich. 504; a boy 4 years old run over by street car.

VIII.

THE MERE FACT THAT THE PLAINTIFF WAS UPON THE RAILROAD GROUNDS WHEN INJURED DOES NOT BAR A RECOVERY.

We think the court will agree with us, that a deaf and dumb boy, whom the institutions disigned for the education of such unfortunates considered too young to be taught, and who never went out except with some person in charge of him, could have no intelligent apprehension of danger. It is not shown that he had ever before seen a railroad track or train. The park was in one sense his own property and play ground. No one had any better right there. How by any possibility was a boy so circumstanced to know that there was danger to him in traveling a few feet either way? There was no change in the appearance of the ground. The railroad grounds were not separated from the park grounds. Only a surveyor could tell which was park and which railroad grounds. None of the railroad companies (Rec. 27) "had taken any steps or precautions to keep off or prevent persons on said park from going on said tracks." It was natural and right he should be in the park; there was nothing to indicate to his mind that it was not natural and right he should be on the railroad grounds. He did not go there by the permission of his parents, but actuated apparently by a boyish fancy, escaped from his brother in whose charge they had placed him with instructions (Rec. p. 28) to "both of them stay in the house," and followed other boys to the park, and aimlessly and without reason for, or a sentiment of fear wandered to the place he was injured. If the Illinois Central Railroad Company had done what it had agreed to do, and what was its duty to do under the law, there is no probability the boy could or would have got to the place where he was injured or that he would have received the injury. In omitting to perform this duty the Illinois Central Railroad Company was guilty of *gross* negligence. The defendant, in using the tracks, was guilty of *gross* negligence equally as the Illinois Central Railroad Company, and inflicted the injury upon the boy. Under such circumstances, would it not be monstrous to affirm that the victim of this criminal negligence had no redress, because without knowledge of wrong he was upon the railroad ground when injured?—and more especially, in view of the fact that the railroad company allowed "crowds of people to cross their tracks" (Rec. p. 26) to the glittering lake beyond, thus practically inviting this boy to go while they made no effort to prevent others from going? An affirmative answer, it seems to us, would be given by any average juryman upon the facts disclosed in the case, and is certainly given by the authorities as to the law of the case.

Says Redfield, in his work on Railways, on page 546:—

"If the wrong of the defendant is so wanton or gross as to imply a willingness to inflict the injury, plaintiff may recover notwithstanding his own ordinary neglect, and this is always to be attributed to defendant if he might have avoided injuring plaintiff, notwithstanding his own negligence; so to if the neglect on the part of the plaintiff is not the proximate cause of the injury, it will not preclude a recovery."

Speaking of the statutory obligation to fence in relation to animals, in *Railroad Company* v. *Sull*, 28 Mich. 510, Cooley, J., (at page 515) says:—

> "The statute is a police regulation adopted as much for the security of passengers as for the protection of monopoly. * * * If contributory negligence could constitute a defense, the purpose of the statute might be in a great measure, if not wholly, defeated, for the mere neglect of the railroad company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his own ground in the vicinity of the road, so that if he did what but for the neglect of the company it would be entirely safe and proper for him to do, then any neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."

In *Whirley* v. *Whiteman*, 1 Head 610, the defendants were owners of a paper mill near Ashville. They had a set of cog-wheels exposed outside the building, and almost 20 feet from the street, with no protection or guards around the cogs, which were generally in motion. The plaintiff's mother lived across the street. The plaintiff, 3 years old, was caught in the cogs and had his right leg crushed The court say:—

> "The ground of defense is, that the injury was occasioned, not by any negligence or want of proper care on the part of the defendants, but solely by the gross negligence and wilful conduct on the part of the plaintiff himself, who was a trespasser on the defendant's property, and whose own wrongful act was the immediate cause of the injury.
>
> "It is certainly true, in general, that if a party, by his own gross negligence, brings an injury upon himself, or contributes to such injury, he cannot recover; for, if by ordinary care and prudence he might have avoided it, he must be regarded as the author of his own misfortune. But an important and well established qualification of this principle is, that the mere want of a superior degree of care or diligence cannot be set up as a bar to the plain-

tiff's claim for redress; and that although the plaintiff may himself have been guilty of negligence, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he will be entitled to recover. *Lynch* v. *Nurdin*, 1 Ad. & Ellis, N. S. 29; Eng. C. L. R. Vol. 41 P. 422; 3 M. & W., 248; 22 Vermont R. 214.

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"We feel clear, upon the facts proved in this record, that the defendants were guilty of negligence—perhaps it might be said of gross negligence—in leaving the machinery so exposed as that, by possibility, it might be the cause of injury to others. And neither the negligence of the parents, in suffering the child to play about the mill, nor the supposed wrongful act of the plaintiff himself, in trespassing upon the defendant's property, can excuse them from liability. In playing about the cog-wheels the plaintiff was 'but indulging the natural instincts of a child;' but yielding to the temptation into which he was led by the negligence of the defendants."

In *Railroad Co.* v. *Stout*, 17 Wall. 657, the plaintiff, a boy 6 years old, was injured on a turn-table about 80 rods from the depot in a small village of about 150 people. The turn-table was near the traveled road. There were no houses near the turn-table and the child's parents lived about ¼ of a mile away.

After discussing the cases of *Lynch* v. *Nurdin; Birge* v. *Gardner; Daly* v. *Railroad Co.*, and *Bird* v. *Holbrook*, the Court say:—

"There are, no doubt, cases in which the contrary rule is laid down, but we conceive the true rule to be this: That while a railroad company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such stranger for injuries arising from it negligence, or tortious act."

* * * * * * * * * *

„So in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on the occasion, and that they had been at play upon the turntable upon other occasions and within the observation and knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it and the defendant should have anticipated that such would be the case."

In *Keffee* v. *R. R. Co.*, 21 Minn 207, the plaintifl, 7 years old, was injured on a turn-table of defendant. The court discusses the question of the plaintiff's being a voluntary trespasser and his being induced to go to defendant's turn-table by defendant's conduct—*i. e.* the R. R. did nothing to prevent plaintiff's playing there when it knew it was attraction to children, and say:—

> "The turn-table, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turn-tables by the defendant's own conduct and that, as to him, the turn-table was a hidden danger, a trap. * * * It is true that the defendant did uot leave the turn-table unfastened, for the purpose of injuring young children; and if the defendant had no reason to believe that the unfastened turn-table was likely to attract and injure young children, then the defendant would not be bound to use care to protect from injury the children that it had no good reason to suppose were in any danger. But the complainant states that the defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was very attractive, and when put in motion by them, dangerous to young children; and knew, also, that many children were in the habit ot going upon it to play. The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement, which, acting upon the natural instincts by

which such children are controlled, drew them by those instincts into a hidden danger, and having thus knowingly allured them into a place of danger, without their fault, (for it cannot blame them for not resisting the temptation it has set before them) it was bound to use care to protect them from the danger into which they were thus led and from which they could not be expected to protect themselves.

"We agree with the defendant's counsel that a railroad company is not required to make its land a safe playing ground for children. It has the same right to maintain and use its turn-table that any land-owner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care in any case must, in general, be a question for the jury, upon all the circumstances of the case."

In *Railroad Company* v. *Fitzsimmons*, 22 Kas. 686, where a boy 12 years old was injured on turn-table, the court say:—

"Was the railroad company negligent? This question was also fairly submitted to the jury, and the jury found against the defendant. It would seem from the evidence that the turn-table was a dangerous machine for boys to use, and yet that it was easily moved by boys, easily turned or revolved upon its axis, and that it was of that alluring character which would naturally invite boys to use it and to play upon it. It was situated within less than half a mile of Leavenworth, a populous city in an open prairie, where the cattle of citizens roamed and grazed, where persons frequently passed and repassed, and where boys often played, and yet it was left without locks or fastenings and without being watched or guarded, or even fenced in. That it would naturally attract boys and induce them to ride upon it, all men ought to know. Now everybody knowing the nature and the instincts common to all boys, must act accordingly.

"NO PERSON HAS A RIGHT TO LEAVE, EVEN ON HIS OWN LAND, DANGEROUS MACHINERY CALCULATED TO ATTRACT AND ENTICE BOYS TO IT, THERE TO BE INJURED, UNLESS HE FIRST TAKES PROPER STEPS TO GUARD AGAINST ALL DANGER; AND ANY PERSON WHO THUS DOES LEAVE DANGEROUS MACHINERY EXPOSED, WITHOUT FIRST PROVIDING AGAINST ALL DANGER, IS GUILTY OF NEGLIGENCE. It is a violation of that beneficent maxim, *sic utere tuo ut alienam non lædas.* It is true that the boys in such cases are technically trespassers. But even trespassers have rights which cannot be ignored, as numerous cases which we might cite will show. But see particularly the cases of *Railroad Co.* v. *Stout*, 17 Wall. 657, and *Keffee* v. *Railroad Co.*, 21 Minn. 207, which are turn-table cases."

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"*Boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own natures* —instincts common to all boys. In many cases where men, or boys approaching manhood, would be held to be negligent, younger boys, and boys with less intelligence, would not be. And the question of negligence is in nearly all cases one of fact for the jury, whether the person charged with negligence is of full age or not."

In *Kay* v. *Pa. R. R. Co.*, 65 Pa. State 272, the plaintiff a child 19 months old, living near the track, escaped from its mother, and was killed. The court say:—

"In giving judgment for the defendants *non-obstante veredicto*, the learned judge took the question of negligence away from the jury. He did this by deciding that the R. R. Co. was in the lawful use of its tracks, and that the plaintift was a trespasser. This left out of view two aspects of the case to be foundin the evidence—the public use of the ground permitted by the company, and the manner of the accident. The ground was a large open lot traversed by railroad sidings and a canal basin. It was leased by the defendants from another railroad company which used it for the purpose of piling and loading lumber; the railroad tracks and canal basin being nearly parallel and in close proximity. The lot lay in Williamsport, adjacent to large saw-mills, where an immense lumbering business is done. In consequence of this business, teams were crossing the lot, and hands engaged in handling the lumber, and the public were permitted to pass to and fro upon it, and along the track where the accident happened a well worn foot-path was plainly visible.

* * * * * *

"Conceding the right of the R. R. Co. to the exclusive use of its tracks over the lot, as the learned judge held; the true question is whether the circumstances created a different duty. The ownership of the lot gave to the company the right to use it as most convenient and expedient in moving its cars; and no one can gain say the right to detach and send cars ahead without a brakesman, even out of sight and around a curve. But the case is altered when, by a license to others, they have devoted this ownership to a use involving their interests and their safety; and by sufferance permitted the public to enjoy a privilege of passage which might bring their person into danger.

"DUTIES GROW OUT OF CIRCUMSTANCES, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care: *Reeves* v. *Del. L. & W. R. R. Co.*, 6 Casey 461; *Phila. & Read. R. R.* v. *Spearin*, 11 Wright 305; *Smith* v *O'Connor*, 12 Id. 222; *F. and M. Turnpike Co.* v. *Phila. & Trenton R. R. Co.*, 4 P. F. Smith 350; Shearman & Redfield on Neg., § 7. *Culpable negligence is the omission to do something which a reasonable, prudent and honest man would do*, or the doing something which such a man would not do *under all the circumstances surrounding the particular case.* Shearman & Redfield on Neg. § 7. In many cases the law gives no better defination of negligence than the want of such care as men of ordinary prudence would use under similar circumstances, Id. § 11. IF THEREFORE, AN OWNER OF PROPERTY HAS BEEN ACCUSTOMED TO ALLOW OTHERS A PERMISSIVE USE OF IT, SUCH AS TENDS TO PRODUCE A CONFIDENT BELIEF THAT THE USE WILL NOT BE OBJECTED TO, AND THEREFORE TO ACT ON THE BELIEF ACCORDINGLY, HE MUST BE HELD TO EXERCISE HIS RIGHTS IN VIEW OF THE CIRCUMSTANCES SO AS NOT TO MISLEAD OTHERS TO THEIR INJURY, without a proper warning of his intention to recall his permission; *Barret* v. *Midland R. R. Co.*, 1 Foster & Finlason 361; *Bateman* v. *Black*, 18 Q. B. 870. Notice, says Rogers, J., is required to a man who acts bona fide, not to him who wilfully and obstinately persists in using that to which he has no title or pretence of title: *Hepburn* v. *McDowell*, 17 S. & R. 384. Persons who use their property, so as to HOLD FORTH AN INVITATION TO OTHERS TO ENTER, GIVE A LICENSE TO GO, as for instance, innkeepers, merchants, &c. Even trespasses will ripen into rights by sufferance and lapse of time, as a way used for twenty-one years. And a parol license accompanied with an expenditure of money will estop, without lapse of time: *Lefevre* v. *Lefevre*, 4 L. & R. 241; *Rerick* v. *Kern*, 14 Id. 267. Toleration is therefore not to be overlooked in testing a man's right to use his property.

"In the present case the R. R. Co. for the benefit of trade resulting to its own profit, built its tracks along the canal basin, and left its lot open for the convenient access of the public in the handling of lumber, and transferring it to the cars upon its tracks. And the lot being thus open to all engaged in that business, it also suffered its tracks to be used by the neighboring population as a way across the lot from one part of the city to the other. As a consequence, people passed and re-passed upon the tracks, and the company and its servants would be led to expect to find them there at nearly all hours of the day. It is not like those portions of the road used solely for the passage of trains, where the company would have not only the right to demand, but reason to expect a clear track. But the presumption of a clear track at this place could not reasonably arise if the circumstances were such as have been stated. A greater precaution against injury to those thus permitted to use the lot and tracks of the company became a duty."

In *Townley* v. *Railroad Co.*, 53 Wis. 626, a child 7 years of age was walking upon the railroad track on her way home from school, and having caught her foot between a rail and the ground was killed by the train. The court say:—

"The plaintiff also offered to prove, in effect, that persons living near the track west of the depot, and other people, women and children, had, for some years immediately before the accident, been in the habit of passing back and forth, up and down, on the same pathway, and in the same direction where the little girl went at the time she was hurt, and that they had been so accustomed to pass, daily and hourly, for several years; all of which was excluded, and exceptions taken.

"This excluded evidence tended to prove an implied consent or license on the part of the defendants that persons might pass on foot along the "switch-path" and across the side tracks to the public street; and the mere fact that other children had been ordered off the track would not conclusively prove that no such consent or license had been granted. If such custom existed, and men, women and children were daily and hourly passing over the same pathway, it certainly had an important bearing, not only upon the question whether *Rosa* was guilty of contributory negligence at the time, but whether the defendants were exercising ordinary care at the time. If men, women and children were daily and hourly passing, the servants of the defendant in charge must have known the fact, and hence were called upon to exercise more vigilance and care, than though such passage seldom occurred. If all classes of people, men, women and children and especially those living up the track in the vicinity of *Rosa's* home, were accustomed daily and hourly to pass over this pathway, then can we say, as a matter of law, that there was a lack of ordinary care in *Rosa* in attempting to do the same thing? Certainly not, unless her tender years were such as to impute negligence to her parents for allowing her to be upon the track at all."

Citing and approving *Railroad Co.* v. *Stout*, and many other cases.

In *Birge* v. *Gardner*, 19 Conn. 506, the plaintiff, a boy between 6 and 7 years old, shook a gate to the defendant's premises, so that it fell down and broke his leg.

The court, after holding that the plaintiff should exercise only that degree of care and caution that might be expected from his age and condition, say:—

"It was said in argument, that the plaintiff was a *trespasser*, although he was a child, and as such was responsible for the civil consequences of his own acts of trespass. We do not decide, whether, in this case, the plaintiff was a trespasser, or not. There are many acts deemed acts of trespass, which involve civil liabilities, where there is no fault, and on the ground, that where one of two innocent persons must suffer, he who is the proximate cause of the injury must be responsible for it. But this is not a case between faultless parties. The gross negligence of the defendant is here the cause of action; and he alone is responsible for the entire consequences of it, unless there has been fault on the plaintiff's part. There is a class of cases, in which defendants have been holden responsible for their misconduct, although culpable acts of trespass by the plaintiffs produced the consequences; as in the cases of spring-guns and man-traps, &c. *Vide Johnson* v. *Patterson*, 14 Con. R. 1.

We think this case was properly submitted to the jury."

In *Railroad Co.* v. *St. John*, 5 Sneed 524, the plaintiff's slave, a lad of eight years of age, was asleep upon the defendant's railroad track, and might have been seen from the locomotive a quarter of a mile, as it approached him; but upon the supposition that the object in the road was the coat of one of the laborers, no signal was given, and no effort made to slacken the speed of the cars, whereby the child was overrun and killed; it was held that the company was liable for the value of the slave.

In *Railroad Co.* v. *Cone*, 22 Vt. 23, the plaintiff, a lad 3 years and 9 months of age, went riding down a hill upon a sled and was run into by defendant. After discussing the question of the negligence of the parents, the court say:—

"The only remaining inquiry is, whether a plaintiff of the tender age of this plaintiff is bound to the same rule of care and diligence on his part, in avoiding or escaping the consequence of the neglect of others, which is required of persons of full age and capacity, in order to maintain his action for redress. In *Lynch* v. *Nurdin*, the question came directly under review before the Queen's Bench, and was very learnedly discussed and fully considered; and that court very fully determined that no such rule of diligence can be applied to an infant plaintiff of very tender years. LORD DENMAN, C. J. after citing the opinion of Lord Ellenborough in *Butterfield* v. *Forrester*, says: 'Ordinary care must mean that degree of care which may reasonably be expected of a person in the plaintiff's situation and this would evidently be very small indeed in so young a child.' The whole case goes on upon the ground that all which is to be required of the plaintiff is care and prudence equal to his capacity. We see no reason whatever to doubt the perfect soundness of the decision. Indeed, any other rule would be wholly impracticable, and must ultimately be abandoned by courts, because juries could not be made to act upon any such artificial and arbitary rules of determination.

"What is reasonable skill, proper care and diligence, &c., can only be determined as matter of fact, by the jury It is impossible to establish any general rule upon so indefinite a subject, and it is impossible to make juries, or merely practical men anywhere, determine these matters except upon the circumstances of each particular case."

In *Lynch* v. *Nurdin*, 1 Q. B. 29, the defendant's servant left his horse and cart unattended in a populous street. The plaintiff, a child seven years old, got upon the cart, in play; another child made the horse move on, while the plaintiff was in the act of getting down from it, in consequence of which the plaintiff was thrown down and had his leg broken.

The court (DENMAN, C. J.) says: "It is urged that the mischief was not produced by the mere negligence of the servant, as asserted in the declaration, but, at most, by that negligence in combination with two other active causes,—the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and so committed a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell at any length. For if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. If, for example a game-keeper returning from his daily exercise should rear his loaded gun against a wall in the play-ground of school-boys, whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a school-fellow, and maim him, I think it will not be doubted that the game-keeper must answer in damages to the wounded party. This might possibly be assumed as clear in principle, but there is also the authority of the present chief justice of the Common Pleas in its support. But in the present case an additional fact appears. The plaintiff himself has done wrong; he had no right to enter the cart, and, abstaining from doing so, would have escaped the mischief. Certainly he was a co-operating cause of his own misfortune, by doing an unlawful act; and the question arises, whether that fact alone must deprive the child of his remedy.

* * * * * * * *

"A distinction may here be taken between the willful act done by the defendant in those cases, in deliberately planting a dangerous weapon in his ground with the design of detering trespassers, and the mere negligence of the defendant's servant in leaving his cart in the open street. But between willful mischief and gross negligence the boundary-line is hard to trace,—I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice. It is, then a matter strictly within the province of a jury deciding on the circumstances of each case.

"They would naturally inquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear, or thronged with a noisy multitude; especially whether large parties of young children might be expected to resort to the spot. If this last mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established.

"But the question remains, can the plaintiff, then, consistently with the authorities maintain his action, having been at least equally in fault? The answer is, that supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instincts of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot avail himself of that fact.

"The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care, the child, acting without prudence or thought has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it. For these reasons, we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the jury, with whose opinion we fully concur."

In *Bird* v. *Holbrook*, 4 Bing. 428, the plaintiff, a trespasser on defendant's grounds, was injured by a spring gun and recovered.

In *Norris* v. *Litchfield*, 35 N. H. 471, where the plaintiff was a trespasser, and that fact was relied on as a defense, the court say:—

"It must be shown that such act is a fault which has directly contributed to the loss or damage of which the party complains. It is not a question * * * whether the party is a trespasser or has done some wrongful act, whether he is guilty of a fault, or of negligence in reference to the matter in question which has directly contributed to the injury."

In *State* v. *Moore*, 31 Conn. 479, and *Ilott* v. *Wilkes*, 3 Barn. & Ald. 304 the defendants were held liable to trespassers, injured by means of spring guns on their own premises; and in *Loomis* v. *Terry*, 17 Wend. 496, by a vicious dog.

In *Daley* v. *R. R. Co.*, 26 Conn. 371; where a girl 3 years old was playing upon defendant's track, the court held that although a trespasser, that fact did not prevent plaintiff from recovering.

So in *Brennan* v. *Railroad Co.*, 45 Conn. 284; where a boy 10 years old was stealing a ride on a street car, and jumped off the car and was injured.

In *Mullaney* v. *Spence*, 15 Abb. Prac. (N. S.) 319, where the owner of a coal yard had an elevator, worked by steam, close to the sidewalk, and during an intermission of work a child got under it by reason of a sliding door, usually closed, being left open, and was crushed—defendant held liable.

In *Hydraulic Works* v. *Orr*, 83 Pa. St. 332, where a boy 6 years old was playing in a private alley of defendant, and was killed by reason of heavy platform on hinges being carelessly left exposed, defendant was held liable.

In *Barnes* v. *Ward*, 9 C. B. 392 and *Hadley* v. *Taylor*, L. R. 1, C. P. 53, the defendants were held liable, for making excavations on their own land close to the public highway, to travelers who without their fault fell into the same.

In *R. R. Co.* v. *McGinnis*, 71 Ills. 346, where appellee's horse was running at large, contrary to town ordinance, the court held, although accident happened in an incorporated town where they were not required to fence, the company was still bound to use *due care* to *avoid* injury to persons and property; nor, did the fact that the horse was wrongfully at large, release them from this duty, and the court say, on p. 348:—

> "And under the rule which we have adopted, that (if) a plaintiff's negligence has contributed to the injury he may nevertheless recover, when the acts of the defendant are willful, wanton or so *gross* as to amount to recklessness."

In *R. R. Co.* v. *High*, ~~12~~ 14 Neb. ~~547~~ 14, where hogs were killed by a railroad company, at a point where the company had failed to comply with the law, it was held only necessary to prove that fact to make a *prima facie* case on the part of the plaintiff.

We are at a loss to know why boys should not be held of at least equal account with hogs. We certainly proved that this boy, who clearly was *non sui juris*, was injured at a point where a company, whose responsibilities the defendant had assumed by using its tracks, had failed to comply with the law. The defendant failed to meet this *prima facie* case in any way. We also proved that his parents, the parties upon whom the law devolves the care of such unfortunates, were at the time in the exercise of more than ordinary care—and the court, without any attempt by the defendant at a defense to this, not only *prima facie*, but apparently unanswerable case, upon some theory of the law, as to which we are not informed, directed a verdict for the defendant.

It is true that the plaintiff did not show and did not try to show that the defendant was guilty of any other fault in the running of the train, which injured the plaintiff, than the gross negligence of running its trains over tracks not properly protected, in disregard of positive law, and under circumstances which any prudent, honest man would consider "inconsistent with the public safety," and likely to result in injuries as serious or more serious than this.

It was proved that this park was a public resort frequented by children, (Rec. p. 26,) that crowds of people went from the park across the tracks when the injury was received to the breakwater, (Sec. plat. p. 33,) and "that neither the Illinois Central Railroad Company, nor any of the railroad companies using said tracks, had taken any steps or precautions to keep off or prevent persons on said park from going on said tracks or across the same to the open water or breakwater beyond," except building a fence north from Park Row, about one-third the distance to the point where the boy was injured, and failing even to keep that in good repair. In other

In *Mullaney* v. *Spence*, 15 Abb. Prac. (N. S.) 319, where the owner of a coal yard had an elevator, worked by steam, close to the sidewalk, and during an intermission of work a child got under it by reason of a sliding door, usually closed, being left open, and was crushed—defendant held liable.

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IX.

THE WANT OF THE FENCE WAS THE PROXIMATE CAUSE OF THE INJURY.

The boy was lawfully and rightfully in the park. If there had been "suitable walls, fences, or other sufficient works to protect persons from danger," the accident could not have occurred, because the plaintiff could not have got to the place where he was injured.

The want of this protection was therefore, clearly, the proximate cause of the injury; and the parties, the defendant being one responsible for the negligence, are responsible for the injury.

This court in *Railroad* v. *Kellogg*, 94 U. S. 469, by its reasoning clearly indicates the rule for determining the question of proximate cause. It says:—

> "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movements, or as in the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the *natural and probable consequence of the negligence or wrongful act*, and that it *ought to have been foreseen* in the light of the attending circumstances."

In *Williams* v. *Railroad Co.*, L. R. 9 Ex. 157, the railroad tracks crossed a public foot-path, and the Act of Parliament required the company to construct a turnstile, which the defendants neglected to do, and a child 4½ years old, having been sent on an errand by its parents, was found on the track with a foot cut off, the court say:—

(KELLY, C. B.) p. 160. "The facts are, that a child of tender years, but of sufficient age to be able to cross the line by himself, was found on the foot-path at the level crossing with its foot severed from its body, and the questions are, first, whether there was any negligence on the part of the defendants which could have contributed to the accident; secondly, whether such negligence was the cause of the accident.

"As to the first point, it is impossible to imagine a case where negligence is more clearly made out, or more inexcusable. A carriage-way of considerable width passed over the line on a level, and about thirty yards distant from this a foot-way crossed the line, also on a level. There was a clear statutory duty to have gates on both sides of the carriage-way, which ought to be kept closed except when animals or vehicles are crossing the line; and as to the foot-path, it was equally required for the protection of the public that a gate or stile should be placed at each side of the railway. Both these duties were left unperformed. This was clearly negligence. I say nothing more as to the carriage-way, because there is no evidence by which it is possible to connect the negligence of the company in this respect with the accident. But the law also required a stile or gate to the foot-path for the protection of the public, and perhaps peculiarly for the protection of human beings less able than ordinary persons to take care of themselves, as infants or infirm persons; but nothing of the kind was done. Now, it is very possible that the existence of a gate or stile upon the foot-path might have prevented the child from going on or might have detained him long enough to prevent this accident from happening. It is true these are only possibilities; but being such, and negligence being established in the defendants, the question is whether, considering the short time which had elapsed since the child left home, and all the other circumstances of the case, a jury may not have been very well satisfied that one or other of those possibilities would have happened, and that if a stile or gate had been there this accident would not have occurred. * * * * * *

(Amphlett, B.) p. 162. "The child being lawfully on the foot-way, and the defendants being guilty of a breach of duty the only question is whether there is reasonable ground for connecting this breach of duty with the accident. It is not necessary to decide this as a jury; it is enough to say that I think it was clearly a case which ought to have been submitted to a jury. There are many possible circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about, and he had met with a stile, he would have probably been turned back, and one of the objects for which a gate or stile is required is to warn people of what is before them, and to make them pause before reaching a dangerous place, like a railroad."

Would not this reasoning apply with greater force in the case at bar? Is it not a matter of moral certainty that a fence on the line between the railroad grounds and the park, would have prevented the injury to the plaintiff? Any obstacle would almost certainly have turned his aimless wandering in the direction of safety!

R. R. Co. v. *Fielding*, 48 Pa. St. 320. Where a boy between 16 and 17 years of age, running with a fire engine at night, to a fire, stepped into a hole on the road bed of the railroad company, and falling across the railroad track, was run over by an engine and had his legs crushed;—It was held that the negligence of the railroad company in suffering the track to be in that condition, was the proximate cause of the accident.

In *R. R. Co.*, v. *Mahoney*, 57 Pa. St., 187, the plaintiff, a child 4 years old, was playing in company with another child in the street, on which the railroad tracks were situated. A train was approaching and seeing the plaintiff between the tracks, and fearing an injury to the child, her aunt rushed across the track, seized the plaintiff and upon attempting to return, fell in front of the engine. The court held that the negligence of the railroad company was the proximate cause, and not the negligence of the aunt.

In *Rauch* v. *Lloyd*, 31 Pa. St. 358, and *Railroad Co. v. Kelly*, 31 Pa. St. 372, it was held the violation of the city ordinance in blocking the streets, was the proximate cause.

In *Powell* v. *Salisbury*, 2 Younge and J., 391. Held the neglect to build a fence by defendant, whereby plaintiff's horse escaped on defendant's land, and was killed by the falling of a hay-stack, was the proximate cause.

A similar case is *Lee* v. *Riley*, 18 C. B. (N. S.) 722, where the plaintiff's mare strayed upon defendant's premises and was kicked by defendant's mare.

In *Salisbury* v. *Herchenroder*, 106 Mass. 458, where defendant hung a sign from his building, in violation of the city ordinance, and plaintiff was injured by its falling, the negligence of defendant was held proximate cause.

The want of the fence was the proximate cause. See

Schmidt v. *Railroad Co.*, 23 Wis. 188.
Birge v. *Gardner*, 19 Conn., 507.
Brown v. *Railroad Co.*, 50 Mo. 459.

X.

THE PROXIMATE CAUSE OF THE INJURY TO PLAINTIFF WAS A QUESTION FOR THE JURY.

This Court has so decided in the case of *Railroad* v. *Kellogg*, *ante*. And in *Railroad* v. *Stout*, 17 Wall. 663, it says:—

"It is true in many cases, that where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the EXISTENCE OF SUCH FACTS COME IN QUESTION, rather than when DEDUCTIONS OR INFERENCES ARE TO BE MADE FROM THE FACTS. * * The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases, that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion of sound inference. WHAT IS THE DEDUCTION TO BE DRAWN FROM THE UNDISPUTED FACTS? Certain facts we may suppose to be clearly established, from which one sensiable, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education, and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life, than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a judge.

In no class of cases can this practical experience be more wisely applied than in that we are now considering. We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

In *Manchester* v. *Erickson*, 105 U. S. 347, where a person was injured by reason of a high embankment being improperly protected, this court held it was for the jury to determine whether the city was liable or not, and it was improper for the court to take the case away from the jury.

In *McMahon* v. *R. R. Co.*, 39 Md. 438, a boy 6 years old, was sent out to a store, alone, in the city of Baltimore. He attempted to cross a street, on which a freight train was standing, contrary to the city ordinances, by crawling under the train, when the train started up, and the boy was killed. The court say it is for the jury to decide whether or not, the negligence of the defendant is the proximate cause.

That the jury are to determine what is the proximate cause, is held also in the following cases:—

McMahon v. *Railroad Co.*, 39 Md. 438.
Railroad Co. v. *McDonald*, 35 Mo. 534.
Clemens v. *Railroad Co.*, 53 Mo. 366.
Rauch v. *Lloyd*, 31 Pa. St. 358.
Railroad Co. v. *Kelley*, 31 Pa. St. 372.
Railroad Company v. *Mahoney*, 57 Pa. St. 187.
McGrew v. *Stone*, 53 Pa. St. 441.
Fairbanks v. *Kerr*, 70 Pa. St. 76.
Railroad Co. v. *Pindar*, 53 Ills. 447.
Trow v. *Railroad Co.*, 24 Vt. 488.
Lake v. *Milliken*, 62 Me. 240.
Perley v. *Railroad Co.*, 98 Mass. 414.
Schmidt v. *Railroad Co.*, 23 Wis. 188.
Kellogg v. *Railroad Co.*, 26 Wis. 223.
(In this last case many of the authorities are reviewed.)

XI.

NEGLIGENCE A QUESTION FOR THE JURY.

This Court said, in substance, in the case of *Railroad* v. *Stout*, *ante*, that where deductions and inferences are to be drawn from undisputed facts it is the province of the jury and not the judge to make them. And in a case, similar in its circumstances to this, say—"In no class of cases can this practical experience [of jurymen] be more wisely applied than in that we are now considering." And that in that case "although the facts are undisputed it is for the jury and not the judge to determine whether proper care was given, or whether they establish negligence."

Thompson on Negligence p. 1235 Sec. 10, says:—

"In general, it may be said that the question of negligence is one of mixed law and fact,—*i. e.*, it is the province of the jury to find the facts in any particular case, and of the court to instruct the jury as to the effect of those facts upon the case of the plaintiff and of the defendant. If the facts found amount, in law, to a breach of duty by the defendant as towards the plaintift, his case is established, unless the plaintift himself is in fault. But, in the great body of cases, there is no evidence of facts from which the court may say that, if proven, they substantiate the case of the plaintiff or defendant. This arises from the fact that cases present such a variety of circumstances that courts have had comparatively little opportunity of defining the duties of the parties, and for the same reason it is eminently proper that the degree of care demanded of persons in various situations should be determined by the triers of fact."

Cooley on Torts says p. 670:—"But in the great majority of cases the question of negligence on any given state of facts must be one of fact. And in no case where the facts are in dispute can the judge take the case from the jury and decide against negligence, as matter of law, unless there is a want of evidence fairly tending to establish the negligence which is counted on."

In *Marcott* v. *Railroad Company*, 47 Mich. 1, the court below took the cause away from the jury. The reviewing court say:—

"Where a case is taken away from the jury it cannot be authorized unless upon the strongest case made, by any of the witnesses, it is manifest there is no cause of action. *Courts cannot assume that the witnesses they would discredit, are to be followed by the jury;* and however much they may be discontented with the result they cannot assume the functions of the jury."

In *Railroad* v. *Van Steinburg*, 17 Mich. 120, another carefully considered case, the court say:—

"The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility. For when the judge decides that a want of care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge trying a similar case may also be of a different opinion, and because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed, in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury. The judge, it is said in one case, is not bound to submit to a jury the propriety of a particular case, when it is perfectly notorious that all prudent men conduct their own affairs differently. The uniformity of the conduct of business men becomes a rule of law.

"But while there is any uncertainty it remains a matter of fact for the consideration of the jury. * * *

"The inquiry not only as to its existence, but whether it contributed with negligence on the part of another to produce a particular effect, is much more complicated. As to both, they present, from their very nature, a question not of law but of fact—that of negligence or its effects—and are to be compared and weighed by the jury, the tribunal whose province it is to find facts, not by any artificial rules, but by the ordinary principles of reasoning; and such principal fact must be found by them, before the court can take cognizance of it, and pronounce upon its legal effect." "*It is a mistake, therefore, to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law.* This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. *When the question arises upon a state of facts, on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined* until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair minded men may differ."

In *Railroad Co.* v. *Slatterly*, L. R. 3 App. Cas. 1155, where notices had been put up by the railway company forbidding persons to cross the line at that particular point, but these notices had continually been disregarded by the public and without any objection on the part of the company, and plaintiff was injured while crossing the tracks. The House of Lords sustained the ruling of the court below, leaving the case to the jury.

In *Townley* v. *Railroad Co.*, 53 Wis. 626, it is said:—

> "Negligence, in one sense, is a quality attaching to acts dependent upon, and arising out of the duties and relations of the parties concerned, and is as much a fact to be found by the jury, as the alleged acts to which it attaches by virtue of such duties and relations."

In *Railroad Company* v. *McDonnell*, 35 Md. 534, a child 2 years was run over by a street car. There was an ordinance of the city of Baltimore forbidding cars running at a faster rate than 6 miles per hour, and there was evidence before the jury tending to show that the car, by which plaintiff was injured, was running faster than allowed by the ordinance.

It was held to be a question for the jury whether the accident would not have been obviated had the car been running at a less degree of speed than six miles per hour.

In *Railroad Co.* v. *Dill*, 22 Ills. 271, the court held, it was for the jury to determine as a question of fact whether the omission to ring a bell at a crossing was negligence, where there was no statute requiring it.

Where facts are disputed, or when, if not disputed, different minds might honestly draw different conclusions, the case should be left to the jury.

Williams v. *R. R. Co.*, 11 Am. Eng. R. R. Cases 424.

See also upon the same point, and to the same effect the following cases and authorities:—

Thompson on Negligence, p. 1235 § 10.
Cooley on Torts, p. 670.
Railroad Co. v. *Collurn*, 73 Ind. 261.
Railroad Co. v. *Henrice*, 92 Pa. St. 431.
Park v. *O'Brian*, 23 Conn. 338.
Railroad Co. v. *Bailey*, 12 Neb. 333.
Railroad Co. v. *Fitzsimmons*, 23 Kas. 686.
Oldfield v. *Railroad Co.*, 14 N. Y. 310.
Kay v. *Railroad Co.*, 65 Pa. St. 274.
Daley v. *Railroad Co.*, 26 Conn. 591.
Railroad Co. v. *Becker*, 76 Ill. 33.
Robinson v. *Cone*, 22 Vt. 225.
Birge v. *Gardner*, 19 Conn. 507.
State v. *Railroad Co.*, 52 N. H. 528.

See also cases cited in last preceding (IX) point of argument.

XII.

CONCLUSION.

In extenuation for printing a brief and argument of such length, counsel can only say that the case is of very great importance to the plaintiff in error. He is maimed for life! What little education he had was begun in the sign language, by using both hands (Rec. p. 27). The possibility of further progress under that system, was cut off with his arm. The loss of it to one, in his otherwise helpless condition, is greater—much greater, than to one possessed of his other faculties. Under these circumstances, we have deemed it our duty to our client to make our quotations from, and citations of authorities full, and attempt to so arrange them that the court may examine any of the questions involved, substantially, independent of the others. That defendant running its cars upon the tracks, lying along the Lake Shore, and adjacent to a much frequented public park in the heart of a city of half a million inhabitants, without any mark or object, to distinguish the line of safety from the line of danger, *invited* the plaintiff upon the dangerous ground where " Trains and locomotives were passing * * *almost constantly*," (Rec. 26.) without the defendant or "any of the railroad companies using said tracks, had taken any steps or precautions to keep off or prevent persons on said park from going on said tracks or across the same to the open water or breakwater beyond said tracks." (Rec. 27.) And that such negligence of defendant was the proximate cause of plaintiff's injury is proven by the record, beyond controversy.

It is true this Court has in *Pleasants* v. *Fant*, 22 Wall. 116, held, that in some instances, a case may be taken away from the jury, by the court, they say, however, it must be such a case, that "conceding to all the evidence "offered the *greatest probative force* which, according to "the law of evidence, it is entitled to, is it sufficient to "justify a verdict?"

Such a case that the Court should be "satisfied that "*conceding all the inferences which the jury could justi*"*fiably draw from the testimony*, the evidence is insuffi"cient to warrant a verdict for the plaintiff."

Can this Court say that in view of the testimony as shown by the record, that the jury could not justifiably find *gross* negligence upon the part of defendant?

Can this Court say, that in view of the authorities, the jury could not also find that plaintiff was *non sui juris?* That he acted only as a child of his age, intelligence and capacity should reasonably be expected to act? That plaintiff's parents were guilty of no negligence contributing to his injury? Can this Court say, in view of the authorities, that a verdict for the plaintiff could not have been sustained by the evidence?

We respectfully submit that they cannot, and that this cause should have been submitted to jury for its determination in the court below, and that the judgment of the court below should be reversed, and the cause remanded for a new trial.

Respectfully submitted,

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J. W. Merriam.
Attorneys for Plaintiff in Error.

111-228

OFFICE SUPREME COURT U.S.
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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1883.

ROBERT HAYES, a Minor,
by George C. Fry, his next friend,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

No. 263.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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Beach, Barnard & Co., Legal Printers, 104 Randolph Street, Chicago.

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No. 263.

REPLY BRIEF OF PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

I.

In reply to the *first point* suggested by the defendant in error that "the defendant is not liable at common law for failure to fence the right of way," we have to say that we did not design to be understood as attempting to assert such a doctrine. The only ground of common law liability we have insisted upon against the defendant is that of negligence. Negligence in running its trains over and upon the ground where the plaintiff was injured, without taking some precautions to prevent injuries of a like character, to persons who were unadvisedly upon their tracks.

The only thing that showed people where their ground was, or that would lead reasoning persons to know that they had left the park and were upon the railroad right of way, was the tracks themselves, and the swift passing engines and trains running upon them. And this at a public park, a resort common to women and children "where crowds of people went," (Rec., 26), a playground for children in the most populous part of a city of half a million people! Why the very statement of the situation shows such a reckless disregard of the public safety, and of the requirement to so use your own property as not to injure your neighbor, as to constitute the grossest of gross negligence, and as such, constituting a common law liability to answer to any one injured in consequence of it, while all that is required of the plaintiff is to show *ordinary* negligence on the part of defendant. The failure to fence was shown as one element of this gross negligence. In this instance that alone would have been sufficient to prevent the injury, but if it would not, then it would have been the duty of these railroads to have adopted other means until they had apparently, and with reasonable certainty, accomplished the object. It was a place made dangerous by the company's own act; and a corresponding degree of diligence was devolved upon it. And if the defendant by the exercise of ordinary care—and will any one dare to say that ordinary care was exercised in this case when the record states, page 27, "that "neither the Illinois Central Railroad Company, nor any "of the railroad companies using said tracks had taken "any steps or precautions to keep off or prevent persons "on said park from going on said tracks," except to build 400 feet of fence north from Park Row, and plant *one* flag-man on this mile of unfenced exposure?—could have prevented the injury then the plaintiff is entitled to recover.

If a proper fence had been there at the time of the injury to the plaintiff, the plaintiff could not have got to the place where he was injured, and consequently, to a certainty, would not have received the injury which maims him for life; and that only common and ordinary prudence was required to suggest this safeguard, is proved by the fact that it was the first means adopted for the purpose. It was for the purpose, largely, of passing upon questions of this kind that juries were invented.

We refer to the cases of *Marcott* v. *Railroad*, *Brown* v. *Railroad*, *Isabel* v. *Railroad*, *Ormsby* v. *Railroad*, *State* v. *Railroad*, *Schmidt* v. *Railroad*, *Trow* v. *Railroad*, cited on pages 24 to 30, *Railroad* v. *Lewis*, on page 32, *Whirley* v. *Whiteman*, *Railroad* v. *Stout*, *Keffee* v. *Railroad*, *Railroad* v. *Fitzsimmons*, *Kay* v. *Railroad*, and *Townley* v. *Railroad*, on pages 78 to 84 of our original brief, as some of the cases establishing both by decision and argument the common law liability of the defendant to the plaintiff, on account of the defendant's negligence in not doing what common prudence dictated should be done under the circumstances, for the protection of the public from danger, the building of a fence being one of the least onerous requirements for the purpose.

But there is a reason inherent in the ordinance, not heretofore adverted to by us, which makes the negligence of the defendant more inexcusable. It is provided in section 1 (Rec., 18) that the railroad might operate its engines and trains under such regulations, as to speed of trains, as the company should establish; and in section 6 (Rec., 20) that only in case of the construction of an outside harbor and the laying out of streets across the tracks should the council regulate the speed of locomotives and trains across the streets and alongside the park.

It is evident, that in thus relinquishing the control of the speed of the locomotives and trains, the common council of the city of Chicago relied for the protection of the public from danger, upon the isolation of the railroad from contact with the people and business of the city by the erection and maintenance by the railroad of "suitable walls, fences, or other sufficient works" for the purpose, thus largely increasing the ordinary responsibility of the railroad companies in that regard.

If the city surrendered this right to control the speed of trains and locomotives along the lake shore to the railroads, can there be any other conclusion than that it was so surrendered with the duty directly and implicitly imposed upon the roads to "prevent" persons from getting upon the tracks by proper provisions made for that purpose?

II.

In regard to the *second point* made in the defendant's brief, that "the defendant is not liable under the ordinance "referred to in the declaration," we are unable to see the application of the authorities cited or the force of the reasons stated in support of the proposition.

The entire ordinance of June 14, 1852, shows that the common council of the city of Chicago was acting in a public capacity. The Illinois Central railroad was not a purely local enterprise. The common council had, under the charter of the city (Rec., 32), power "to direct and

“ control the location of railroad tracks and depot grounds.” In the exercise of that power it passed this ordinance. How otherwise were the tracks and depot grounds of the company located?

Counsel say: “ The ordinance was not the grant.” What, then, was the grant? Where else is found any authority for the Illinois Central railroad to lay tracks or build a depot in the city of Chicago? Counsel say: “ It “ gave no right.” Where, then, did the Illinois Central railroad get the right? Suppose it was legislation preliminary to a contract; it was nevertheless legislation, and from June 14, 1852, to March 28, 1853, it was a public law upon the statutes of the city, without any “ energizing ” by the contract between the city and the Illinois Central railroad then entered into; and we are now wholly at a loss to understand how the making of a contract provided for in a public law merges that law in the contract.

Again counsel say: “ The city of Chicago was seized “ of the property upon the lake shore, not as a public fiduciary, but absolutely in its proprietary or private ca“ pacity.” We apprehend if this statement could be established as a verity, one of the most serious legal muddles of the time would be solved, and when the ordinance expressly recited that the “ city of Chicago does not under“ take to obtain for said company any right of way, *or* “ *other right, privilege, or easement, not now in the power* “ *of* said *city to grant or confer*. (Sec. 1; Rec., 18.) But where is the authority for it? Even if it were so along the lake front, was the right of way from the southern limits of the city to Park Row, a distance of two miles, the private property of the city? Every foot, except the streets, was owned by private individuals. Where but through this ordinance did the outside harbor and the laying out of streets across the tracks should the council regulate the speed of locomotives and trains across the streets and alongside the park.

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Illinois Central railroad get its authority to purchase or condemn and occupy this land within the limits of the city? Was the ordinance a public law in that regard and a nullity after it reached Park Row? The whole reasoning of counsel upon this point strikes us as not only foundationless but absurd. It is entirely ignored by the contemporaneous construction of the parties to the subsequent contract of March 28, 1853, who say in the preamble to that contract: "Whereas, the common council of the city "of Chicago, in the State of Illinois, *under and by author- "ity conferred by the laws of said State and the charter of "said city*," did "pass and adopt" said ordinance, "in due "and legal manner and form," &c., "*granting* permission "to the Illinois Central Railroad Company to lay down, "construct and maintain, within the limits of the city of "Chicago and along the margin of the lake, within and "adjacent to the same, a railroad," &c. (Rec., 22.) They said then, eight months after the passage of the ordinance, that it was "the grant"; that it granted the company permission to construct and maintain its road within the city limits, and *along the margin of lake!* They raised no question of *ultra vires* then, and if in all the litigation of the last thirty years with regard to the right of the city to regulate and control railroads entering the city, the right to prescribe conditions to the grant of permission to construct railroads within the city limits has never been questioned, and we respectfully submit that it never has, then it is too late to raise the question of *ultra vires* to the exercise of that power by the common council in this ordinance, after a contemporaneous ratification and over thirty years of unquestioning acquiescence, and especially when, under the solemn obligation of the agreement, the company declared (Rec., 24, 8th line) said ordinance to be a "*binding* and *perpetual* obligation" upon it.

Counsel further say: "The transaction is between vendor and vendee" (p. 10). In what manner? What did the city of Chicago sell? What did the Illinois Central Railroad Company buy of the city? Nothing. The transaction effected by the ordinance, was a simple grant of privileges, coupled with conditions; and the subsequent contract entered into between the parties, was an acceptance by the railroad company of those privileges and conditions, and an agreement to observe all the conditions of the grant. We see no reason why the city of Chicago might not have an action for a breach of this contract; but we are wholly unable to see, appreciate or understand the logic which holds, that because the city might have its action for a breach of the contract, a citizen injured through the failure of a railroad company to perform the same duties required by a public law that were subsequently embodied in the contract, should be rendered remediless by the contract, while the law stands in full force and unrepealed. This would be subordinating the greater to the less with a vengeance. If the case of *Atkinson* v. *New Castle*, cited at page 11 of the defendant's brief, gives color to any such doctrine, we respectfully submit that it is without support, and is met by the entire line of authorities quoted in our original brief, pages 22 to 38 inclusive, and the authorities cited by the text writers, quoted by us on pages 22 to 24 inclusive, and which authorities, we submit, fully support the text.

Says counsel, the obligations of the railroad lie wholly "in contract." Suppose its charter had required the road to fence along its right of way, and the plaintiff had been injured by defendant, by reason of the want of such fence, do they mean then, the plaintiff could not recover? The charter, this court and numerous other courts have held, are contracts. The analogy is parallel.

The allegation that action by the city was a pre-requisite to performance by the company (p. 12), was anticipated and fully considered in our original brief, pages 35 to 38. And our position is also fully sustained by the case from 47 N. Y., cited by the defendant in error (p. 13), *City of Brooklyn* v. *Brooklyn, &c., Railroad Company*, where the latter company gave a bond to the city, to keep certain streets, upon which its road ran, and which covenant is as follows, to keep the streets and pavements "in thorough repair within the tracks, and three "feet on each side thereof, with the best water-stone, "*under the direction of such competent authority as the* "*common council might designate.*"

And the court there say (FOLGER, J.):

"The claim of the defendant, that there is a condition precedent to be observed by the plaintiff, before it the defendant is obliged to do, is not well founded. It is true, that by the terms of the instrument, there is reserved to the plaintiff, that the repair shall be under the direction of such competent authority as the common council may designate; but it can not be successfully contended, that by force of this provision, the plaintiff can lawfully demand of the defendant, that it do more than by the previous terms of the condition it is bound to do. The direction of the competent authority is not to be a capricious one. Reason must guide and limit it. If the pavement is kept in thorough repair over the whole of the special space, with best water-stone, that is as much as the plaintiff can exact, and when such a state of repair is kept up by the defendant, there is no breach of its contract, though it be kept up without direction from the competent authority designated by the common council. *Had that authority been designated, and had it assumed to direct, it could demand no more than a performance in fact, to the limit of the legal requirement;* and if the facts showed that the legal requirement was fully met, though the direction went farther, or, otherwise, the defendant has satisfied its obligation; *for the reservation to the plaintiff of the power to direct, is no more in effect than the not unusual condition in contracts, that the work to be done shall be to the satisfaction of the recipient party. Such satisfaction is not an arbitrary or capricious one. It has its measure by which it can be filled. That which the law shall say a contracting party ought, in reason to be satisfied with, that the law will say he is satisfied with.* Thus, in *Folliard* v. *Wallace* (2 J. R., 395), there was an agreement to pay money three months after one should be well satisfied that a title was good, etc. The court, per KENT, Ch. J., said: '*The law will determine for the defendant when he ought to be satisfied.*'

" Inasmuch then, as all which the defendant can be required to do is plainly pointed out in the contract; and as when that is fully done, the contract is satisfied, and the plaintiff can exact no more, we do not think that clause providing for the work of repair, to be done under the direction of such competent authority as the common council may designate, makes a condition precedent to the performance by the defendant, and compels the plaintiff to first designate such authority before it can hold the defendant to its agreement to keep in repair.

"*The clause is in effect no more than a reservation to the plaintiff of a right of supervision of the work as it goes on, so that it shall have a concurrent check upon a faulty or deficient performance by the defendant.* It is like another condition in the same instrument, to wit: 'The taking up of so much of the streets and avenues as shall be necessary to lay the rails of said lines of railroad, shall be subject to the supervision and direction of the said street committee.' It will not be contended by the defendant that this prevented it from the exercise of the privilege of taking up the streets and avenues 'until directed or authorized so to do by that committee.' It meant only, that as the work of taking up went on, the committee might interfere by suggestion, advice, perhaps command, as to manner and as to extent, from time to time; so the kindred phrase, with which we are concerned in the other part of the agreement *did not restrain* or *excuse from performance*, but kept that performance under the direction of the authority designated, if the common council should at any time designate."

This is exactly the case at bar, when the railroad company constructs such a fence as is sufficient to "*protect*" innocent children lawfully in the park, "from danger," that is all the law requires, and the ordinance would be satisfied. No supervision on the part of the city was necessary.

The cases cited (on page 12) by the defendant, relate to private contracts. Says the court, in the case of *Brooklyn* v. *Railroad Company*, *supra*, a different rule applies as to contracts made on behalf of the public, and the court there says (page 485):

> " *When one contracts with that corporation to keep any portion of those streets in repair in consideration of a license to use them to his benefit in an especial manner, he in effect contracts to perform that duty to the public in the place and stead of the municipality*, and the way is given over to him for that purpose, and he takes it into his care and charge therefor, and his failure to perform his contract is a failure to do that duty, and the damages which naturally and proximately result from non-performance are all the damages which naturally and proximately fall upon the corporation from the duty not being performed.
>
> "The different principles which govern the different classes of cases grow out of the differences in the contracts with which the classes of are respectively concerned. The one relates to private matters alone. The other relates to matters with which the public and third persons are also concerned, and as we read the decision in *Robinson* v. *Chamberlain*, (34 N. Y., 389), that case

goes on the same principle, or one near of kin. That was an action against the defendant, a contractor with the state to keep in repair a section of the canals for an injury resulting to a boat of the plaintiff from a lock-gate being out of repair. It was held that by the contract of the defendant with the state, he assumed the duties and was invested with the power of a public officer, and that the portion of the canal covered by the defendant's contract was a public highway; that he, by his contract, assumed the duty of keeping in repair a public thoroughfare, and was therefore liable in a civil action to any one of the public sustaining special damage from his neglect to keep it in repair. His contract was not with the injured parties but with the state. But it was a contract to perform a duty to the public, for a neglect of which the state, but for its sovereignty, would be liable to the party injured. *And so by the force of his contract, he having thereby assumed public duties, he was held liable to one injured by a neglect to perform them.*

"Such was the contract of the defendant. In consideration of the permission granted to it by the plaintiff to use for a particular purpose and in a particular manner, in part for its own benefit, certain public ways, it agreed to keep in repair the pavement on those ways, and thus to do the duty which the plaintiff owed to the public. This repair it did not keep up. This duty it did not. *Injury resulted to one of the public, who recovered of the plaintiff for failure of duty, his lawful damages. Now the defendant is answerable to the plaintiff in damages.* And why? For not doing just that, for non-performance whereof the plaintiff was made to answer to the injured person."

In the defendant's brief, page 13, it is said: "This is "not the case of a duty imposed by a general statute," and on page 14: "The case at bar is distinguishable "from those * * * wherein it was held that a duty "imposed by general statute upon all railroad companies "was incumbent upon companies operating under lease," but no authorities are cited sustaining the first assertion or making any such distinction.

The case of *Mason* v. *Shawneetown*, 77 Ills., 533, cited on page 34 of our original brief, is directly to the point that where an incorporated city is invested by the legislature with power to pass an ordinance for the government or welfare of the municipality, such ordinance has the same force and effect as a law passed by the legislature. It therefore is a general law to the limits of the municipality, to the same extent that a legislative enactment is to the limits of the state. The state law regulates the location and fencing of railroads, and exercises control over them outside the limits of incorporated cities and villages; in incorporated places it delegates this authority to the municipalities. In both cases the legislative authority is supposed to be executed, whether by legislative act or ordinance, for the regulation and control of these railroads only to the extent required by the public good. Is there any reason why the legislation provided for incorporated places should be less broad, less general, less binding upon the corporations than the legislation provided for unincorporated places? Or why a railroad company running its trains over a track belonging to another company should be held liable for a disregard of a public law in the country, but not so liable in a city? The distinction attempted to be drawn has no foundation; does not exist. The ordinances of a city authorized by its charter are as much public and general laws within the municipality as the laws of a state under its constitution are public and general laws within the state.

The case of *Lowery* v. *Brooklyn*, cited on page 14 of defendant's brief, has no application, because it does not appear that any general law required either company to keep the street in repair; and only the one company was affected by the contract. If it goes further it stands by itself in opposition to all the recognized authorities, and the authorities cited by us in our original brief, pages 38 to 45.

The position taken in defendant's brief (page 15) that the ordinance did not have reference to the place of the accident, strikes us as being more ingenious than ingenuous. We do not suppose that at the time the ordinance was passed it was expected that a fence would be built along the west line of the main track of the Illinois Central railroad right of way, where the water formed a barrier so efficient that the operation of the road would not be "inconsistent with the public safety"; but to suppose for a moment that the common council intended the public to be protected by a fence or other sufficient works from the city limits to Park Row, and the most used and most dangerous part of the yard from Park Row to Randolph street to be left without any protection is an impeachment of their common sense. The lake shore extended from the city limits to Randolph street, and if the word "ground" is to qualify the western line pointed out for the main track of the railroad, then it would be but reasonable to hold the requirement to extend to such points as the western line run upon the ground, and as fast as the water barrier was removed by filling, and ground was made to take the place of water on the west line, to require the erection of such walls, fences or works as were required where ground originally existed. Such a construction alone would protect the public, and as the walls, fences or works were required and provided *pro bono publico*, the ordinance must be construed in such manner that it may as far as possible attain the end proposed. The end proposed could only be attained by requiring the railroad to fence as it filled up the water barrier, and as additionally such a requirement is most consistent with the terms of the ordinance, the objection would seem to be wholly without weight.

That the ordinance did cover this point is capable of further absolute demonstration.

Section 7 of the ordinance (Rec., 20) provided for the erection and *maintenance* of "breakwaters" from the north line of the Park to the southern boundary of the city. Why? The same section says, "to protect the entire front of said city "between the north line of Randolph street and its southern boundary from further damage or injury from the "action of the waters of lake Michigan," which, it is a well known fact, had been encroaching from time to time.

By section 57 of its charter (in force when this ordinance was passed) the city had power "to fill up, * * "alter * * and regulate any grounds, yards, *basins*," etc. (Rec., 32.)

Section 3 of the ordinance of June 14, 1852, expressly provides for the *filling up* by the railroad company of its right of way *east of and adjoining* the Lake Park as follows:

"SECTION 3. The said company may * * *fill out* "*into the lake* to a point in the southern pier not less "than four hundred feet west from the present east end of "the same; *thence parallel with Michigan avenue to the* "*north line of Randolph street extended.*" (Rec., 19.)

Section 3 of the ordinance of September 10, 1855 (Rec., 30), introduced by defendant, provided that the railroad company should *fill up the park grounds between* the right of way of the company and the shore as it then existed, opposite that part of the right of way then affected.

And the record (p. 25) shows that along Michigan avenue originally there was a strip of land, that the "basin" had been partially filled before the fire of 1871, and that after that fire the *entire* basin was filled up, and most of the railroad company's right of way also.

The ordinance provided for the laying out of and opening of streets across this ground, and for all uses that it could conveniently be used for.

Further, the ordinance (Rec., 18), grants the right of way across the "open space known as Lake park." If they had intended that the protection for the public was to be exercised everywhere else and not here, it would have said so. But this expression "open space," is well defined by the ordinance. In section 2 in the ordinance, the Lake park is spoken of as "*said public ground*." "The "inner or western line of the *ground* to be used by said "company to be not less than four hundred feet east from "the west line of Michigan avenue, *and parallel thereto;*" and where in section 6 it is provided that "the said com-"pany shall erect and *maintain* on the western or inner "line of the *ground* pointed out for its main track on the "lake shore, as the same is hereinbefore defined, such "suitable walls, fences, or other sufficient works," *etc.*, does it not refer directly to the "western or inner line," pointed out directly in section 2?

Again in section 8, it is again spoken of as "the open "*ground* known as Lake park."

With these provisions in the ordinance itself can it be said that it was not intended to fill up the basin? Why provide in the ordinance for "filling in" under its right of way, if that was not the intention? This ordinance was undoubtedly, as private laws usually are—drawn by the company itself, and the courts construe them strongly against the party acquiring rights or grants under them. See:

Railroad Co. v. *Litchfield*, 23 How., 56.

If then the intention was to "fill in" east of the western line of the right of way, can any reasonable man say it was the intention to have a *stagnant* basin or cesspool for all future time in the heart of a populous city instead of a public park? Is not the last the more reasonable construction.

It is true that at the time of the passage of the ordinance, most of this space was an open *basin*, but it is evident that it was contemplated by the city to fill it up, as under its charter it had power, else why limit the railroad company as to the location for its tracks upon or in moving across the open water; and long before the fire of 1871 the filling had commenced (Rec., 25), and under the construction as suggested by us above, the ordinance clearly applies here.

Says counsel also, "Animals were provided against—"others could not well intrude" (page 15). Notwithstanding the wording of the ordinance, able and learned courts have held that this provision is as much for the benefit of the public as "animals."

See quotations from *Trow* v. *Railroad*, *Schmidt* v. *Railroad*, and *Brown* v. *Railroad*. (Plaintiff's original brief, pages 24, 25 and 28.) These authorities say that the ordinance is as much for plaintiff's benefit as that of an animal.

The suggestion that the railroad had no right to enter upon the park and construct the fence (p. 15), is of no force, as by the words of the ordinance the railroad's duty was to maintain the fence on its *own* ground, to wit, on its inner line of the right of way, and for that purpose the ordinance gave it full power, and they have already put their own construction on this by *erecting* a fence on the south end of the park, on its western line of the right of way, and then suffering it to decay and get out of repair.

The broad ground is taken on page 16 of the defendant's brief, that "the ordinance * * * cannot create a civil "liability enforcible at common law," or, as stated in other words, that "a municipality cannot by ordinance create a "civil duty." We have heretofore demonstrated, under the authority of *Mason* v. *Shawneetown*, 77 Ills., 533, that in this state, where a city has been invested with authority to pass an ordinance for the government or welfare of the municipality, an ordinance has the same force and effect as a law passed by the legislature. In other words, is a general law of the municipality. The assertion, that such an ordinance, such a law, "cannot," or does not, "create "a civil liability enforcible at common law," is contrary to all known law. The defendants have cited four cases decided in other states upon their special circumstances, in some of which the unwarranted generalizations quoted from defendant's brief were indulged in. However, it might have applied to ordinances passed upon by the courts which rendered these decisions under the local laws governing them, or the peculiar circumstances of such case. Such, clearly, is not the law in this state, where the disregard of the requirement of the provisions of ordinances enacted by cities for the regulation of railroads, and in the exercise of the general control vested in municipalities by their charters over all railroads within their limits, have often and always, been held to be *prima facie* negligence, and to constitute a right of recovery in favor of any person injured by such disregard of law. To say that an ordinance of the city of Chicago, limiting the rate of speed on railroads within its limits to four miles an hour, did not create the civil duty on the part of the railroads, not to exceed that rate of speed; or, that an ordinance requiring a flag-man to be stationed at a particular crossing, on a particular railroad, did not create the civil duty of placing the flag-man, as required by the ordinance, would be to deny an evident fact; and to say that a disregard of the requirement of these ordinances resulting in an injury to an individual, would not create a civil liability in favor of the party injured, is to deny an established canon of the law, and overrule all the whole line of authorities referred to in our original brief, pages 22 to 34.

If such is the law where the duty is. imposed without benefit, how much stronger the reason of it becomes, where the ordinance is coupled with a benefit to the party upon whom it devolves the duty; or, as in this case, where the duty is imposed as the condition of a grant. In all the cases cited by defendant, the ordinances imposed a duty not known to the common law, where the omission to do the thing required would not have constituted negligence, or been actionable at common law, and imposed a penalty; in all which respects, as well as in not conferring a benefit upon the party on whom the duty was imposed, or being the condition of a grant, the ordidances mentioned in the cases cited, differed from the ordinance of June 15, 1852.

In fact, the very cases themselves cited by defendant, draw the distinction, and make it cover this case.

In *Railroad* v. *Ervin*, it is said: "There are, indeed, "cases where such ordinances have been received in evi-"dence in common law actions for negligence, but they "are generally *such as enter into the case itself*, OR EN-"FORCE A COMMON LAW DUTY. Such an ordinance regu-"lating the speed of railroad trains when passing through "towns or cities. *Here the ordinance may, and usually* "*does, enter into the question of negligence.*"

And in *Flynn* v. *Canton Co.*, the court say of the ordinance considered in that case, "It is not like the case "where an individual is bound by a private statute *under* "*which he derives a benefit*, or *by a certain tenure to keep a* "*road or bridge in repair*, nor like the case of turnpike "companies or other *private corporations, charged with the* "*performance of certain duties by the act under which they* "*are incorporated.* In all such cases the duty is perfect "and binding at all times, and its neglect is followed by this "responsibility, because it is *founded on a valuable con-*"*sideration, or made the condition of a grant.*"

As this ordinance was as necessary to the Illinois Central railroad to enable it to lay its tracks and operate its road at the place of the injury, as was its act of incorporation, and conferred very large benefits upon that corporation, and the requirement to "erect walls, fences, or other works," was a condition of the grant, and as the requirement was simply enforcing a common law duty on the part of the railroad, it is obvious, under the distinctions made by the authorities cited, that the ordinance here is not within their purview, and that they do not lay down the law of this case. Aside from the distinction as sought to be shown by the defendant in error, there is no penalty attached to the ordinance of June 14, 1852, or the agreement executed in pursuance thereto by the railroad.

of ordinances enacted by cities for the regulation of railroads, and in the exercise of the general control vested in municipalities by their charters over all railroads within their limits, have often and always, been held to be *prima facie* negligence, and to constitute a right of recovery in favor of any person injured by such disregard of law. To say that an ordinance of the city of Chicago, limiting the rate of speed on railroads within its limits to four miles an hour, did not create the civil duty on the part of the railroads, not to exceed that rate of speed; or, that an ordinance requiring a flag-man to be stationed at a particular crossing, on a particular railroad, did not create the civil duty of placing the flag-man, as required by the ordinance, would be to deny an evident fact; and to say that a disregard of the requirement of these ordinances resulting in an injury to an individual, would not create a civil liability in favor of the party injured, is to deny an established canon of the law, and overrule all the whole line of authorities referred to in our original brief, pages 22 to 34.

If such is the law where the duty is. imposed without benefit, how much stronger the reason of it becomes, where the ordinance is coupled with a benefit to the party upon whom it devolves the duty; or, as in this case, where the duty is imposed as the condition of a grant. In all the cases cited by defendant, the ordinances imposed a duty not known to the common law, where the omission to do the thing required would not have constituted negligence, or been actionable at common law, and imposed a penalty; in all which respects, as well as in not conferring a benefit upon the party on whom the duty was imposed, or being the condition of a grant, the ordidances mentioned in the cases cited, differed from the ordinance of June 15, 1852.

In fact, the very cases themselves cited by defendant, draw the distinction, and make it cover this case.

In *Railroad* v. *Ervin*, it is said: "There are, indeed, "cases where such ordinances have been received in evi- "dence in common law actions for negligence, but they "are generally *such as enter into the case itself*, OR EN- "FORCE A COMMON LAW DUTY. Such an ordinance regu- "lating the speed of railroad trains when passing through "towns or cities. *Here the ordinance may, and usually "does, enter into the question of negligence.*"

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In each of the cases cited by the defendant there was a penalty attached for a violation of the terms of the ordinance; not so here. Here the city under its charter, by power expressly delegated to it by the legislature "*to di-* "*rect and control the location of railroad tracks*," authorizes a railroad company to lay its tracks in a certain manner provided it will construct such barriers, etc., as will "secure persons from danger." Can there be any question that under this and the other provisions of its charter (Rec., 32) as to the power of the city to require conditions from the railroad company?

Even if a penalty were attached to the ordinance, the law is well settled that this ordinance being for the benefit of individuals, each individual has a right to avail himself of it, and the penalty would be considered only a cumulative remedy.

Cooley on Torts., page 654 and *cases cited.*

III.

It is enough to say upon the *third general point* made in the defendant's brief (p. 17) "that there is no evidence that the failure to fence was the proximate cause of the injury; that it was shown in evidence that there was no fence opposite where the boy was injured, that the boy was playing in the park, near the place of the injury, a moment before it occurred, and under such evidence it was clearly a question for the jury to determine how he got there. Counsel say: "It was open to the plain- "tiff to enter upon the track in one of three ways." (a.) "That he might have entered at Park Row." But there was the end of a street, where the company was either required *to* fence or construct a gate, if required. (Sec. 6.)

Either would have barred that entrance. (b.) "He "might have climbed the fence." If he could, the act would have afforded conclusive evidence that the fence was insufficient to protect persons from danger. (c.) "He might have crossed the territory north of Har- "mon court." If he did, then he got upon the tracks where the duty to protect was positive. However he got on the railroad grounds—he was there—and how he got there was clearly a fact for the jury. Counsel mention the plaintiff at the time of the trial as "an apparently "bright and full-grown boy of eight years and nine "months," but omit to mention that he was deaf and dumb, and so had been for two years; was never permitted to go out except in the care of his parents and an elder brother, and was as helpless as a boy three years of age in the possession of all his faculties. Counsel say that he was "running along beside" the train. One witness testified (Rec., 28) that "he was scraping his foot "and looking down" when the train was passing, and another that he "started to run," and "*just as he started*" "turned and fell."

Is it a question of speculation, how the plaintiff got on the tracks? The plaintiff had his dinner at his home about four o'clock, he then went out and played, in care of his older brother, across the street, and afterwards escaped from his care and followed the procession east and south to 12th street in company with other boys, and then started for home, going north, entered the park near Park Row; played *in the park* for about fifteen minutes (Rec., 28); and was injured about five o'clock (Rec., 29) at a place 1,100 feet north of 12th street and 800 feet north of Park Row while on his way home, and had it not been for the negligence of the railroad would have arrived safely there.

11-24

OFFICE SUPREME COURT U.S.
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JAMES H. McKENNEY, Clerk

—IN THE—

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1883.

No. 263.

ROBERT HAYES, a minor, etc.,
Plaintiff in Error,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY,
Defendant in Error.

In Error to the Circuit Court for the Northern District of Illinois.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

ASHLEY POND,
Attorney for Defendant in Error.

DETROIT.
RAYNOR & TAYLOR, BOOK AND JOB PRINTERS.
1884.

SUPREME COURT.

OF THE UNITED STATES.

ROBERT HAYES, &c.,
vs.
M. C. R. R. CO.

October Term, 1883.
No. 263.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

This was an action in the Circuit Court of the United States for the Northern District of Illinois, for damages for injuries received by the plaintiff, through the alleged negligence of the defendant.

The judgment below was for the defendant, under the direction of the court.

The plaintiff brings error.

The injury occurred on St. Patrick's day, Sunday, March 17, 1878. The plaintiff was then 8 years and 9 months of age, and at the time of the trial was apparently bright and well grown. He was deaf and dumb from the effects of illness during infancy. The plaintiff's father had permitted him to go out with his brother James, who was two years his elder, to view a procession of Catholic societies. They returned for dinner between three and four o'clock, and after dinner, with the permission of their parents, the plaintiff and his brother James went across the street to a vacant lot to play. James returned alone, explaining to his parents that the plaintiff had found some money, and had gone to a candy store in the building in which they lived. They directed him to go after the plaintiff, and to bring him home. The plaintiff, however, returned to the vacant lot, and while there at play a portion of the procession passed. In company with several other boys, but without his elder brother, the plaintiff followed it east on Van Buren street four blocks to Michigan avenue, and south upon Michigan avenue seven blocks to Twelfth street. They retraced their steps north about half a block to Lake Park, where they played "tag" for about fifteen minutes. From this time to the moment of the accident, the plaintiff's movements are not traced. But one witness testified to the incidents of the injury. He saw a freight train of the defendant moving northward on the tracks of the Illinois Central Railroad Company, which were on the east side of the park. The plaintiff was running along by the side of this train, with his hands reached out towards a car. Upon the ladder of one of the cars was a colored boy, who was motioning to the plaintiff to come along. When the plaintiff was at a point about 786 feet from the south end of the park he fell, and one or more cars passed over his arm.

upon the termination of this lease, upon the terms hereinbefore specified and set forth, they will deliver the said Rector, party of the first part, or to his successors in office, or grantees, or to whomsoever at that time, in law, may have the right to control said trust property, all the lands that are hereinbefore leased to the parties of the second part by said party of the first part, promptly, without failure and free from let or hindrance of any kind whatever, together with all buildings, out-houses, and improvements that may be erected on said premises."

Which said lease was proven and filed for record as required by law.

Before said lease was made the Appellant had made certain improvements on the land in controversy, of the value of at least one thousand dollars, in excavations, grading, and building a wall to protect the land from the action of the stream bounding the same, and known as "Hot Springs Creek," besides erecting valuable buildings and other improvements thereon. After said lease was made a hotel was built on the premises, and a short time before the end of said term it was agreed between the Appellant, said Trustee, and said Lessees, that the lease should be continued until some time in the future when it might be terminated by the written notice as provided in said lease.

In the year 1877, said Lessees sold and transferred to one David Ballantine all their right and claim to the leased premises, he well knowing before the transfer all the terms and conditions of said lease. While said Gibbon and Kirkpatrick were in possession of said premises, and before said transfer, Appellant gave them notice, as required by the lease, and requested them to furnish him with a list of the furniture coming within its provisions, which they promised to do, but never did; so that Appellant never could get from them the information necessary for a basis of settlement; and no settlement was ever made, though Appellant was always ready and willing, and frequently offered to pay said Lessees all sums that might be due them under the terms of the lease—which offer they always declined, under various pretences, to receive. After entering upon said premises by virtue solely of the said transfer from the said Lessees, the said David Ballantine died, leaving him surviving certain persons, named in the bill, as his heirs at law.

By the Survey caused to be made by the Commissioners appointed under the act of Congress, entitled "An Act in relation to the Hot Springs Reservation in the State of Arkansas," approved March 3, 1877, a part of said leased premises, was laid off and designated as lots five, six, seven, eight, nine, ten and eleven, in block eighty-nine, in the Town of Hot Springs, and the residue thereof was laid off into a street, and on said street were situated the hotel and some of the out-buildings connected therewith, erected on said premises under said lease; and the said Commissioners gave to the heirs of the said Ballantine, a certificate showing that said hotel and other buildings in said street had been condemned, and that they were of the value of ten thousand dollars, and they were accordingly torn down and destroyed.

In less than six calendar months after the first sitting of said Board of Commissioners, the Appellant filed his claim before them to purchase said lots, and the heirs of the said David Ballantine filed a like claim, and on a hearing of these matters before said Commissioners they awarded the right to purchase the said lots to the said heirs, although it was fully shown to them that the said David, their ancestor, had acquired his possession thereof in no other way but by said lease, made by the Appellant to said Gibbon and Kirkpatrick. And it is therefore averred in the bill that the heirs of the said David Ballantine should be held to hold said lots as trustees for the use of Appellant, who offers to pay any sum that may be found to be due them or either of them, by reason of any money they may pay out for the purchase of said lands. The prayer is for an accounting, and that the heirs of Ballantine be decreed to hold the land as trustees for Appellant, and required to convey the same to him; and for general relief.

It was decided by the Circuit Court:

1. That the decision of the Commissioners upon questions of law and fact submitted to them in accordance with the terms of the act of March 3, 1877, is in the nature of a final adjudication and conclusive upon the parties. And,

2. That, assuming the decision of the Commissioners not to be final and conclusive, it was nevertheless correct.

ASSIGNMENT OF ERRORS.

1. The Court below erred in holding that the decision of the Commissioners was final.

2. The Court erred in holding that said decision was correct.

1. The act of Congress of March 3, 1877, was essentially a pre-emption act, and it is not easy to perceive how, under its provisions, questions of greater difficulty were likely to come before the Commissioners for their decision than ordinarily arise under the pre-emption laws of the United States in cases before the Register and Receiver of the land office where, in a contest between two or more persons, each claims to have made improvements on the same land and insists on his right to purchase. This is manifest when we compare the act in question with the several pre-emption acts referred to and discussed by MR. JUSTICE MILLER, in *Johnson vs. Towsey, 13 Wall, 72.* The Register and Receiver are permanent officers in the land department, and the Commissioners were officers for a limited time in the same department, charged with duties similar to those which often devolve on the Register and Receiver, and were certainly of no higher character. The act of Congress did not require that the Commissioners should possess qualifications superior, in any respect, to those we might expect to find in the Register and Receiver; nor were they to possess any special fitness for the exercise of judicial functions. They were to be discreet, competent and disinterested persons, but the act did not require that they should be learned in the law, or that they should know any law. They were acting in the discharge of ministerial duties touching the sale of a portion of the public lands; and the act which provided for their appointment also directed how they should organize as a board, and in what manner they should perform those duties. In the nature of things they were as liable to make a mistake in the

construction of the law of Congress under which they acted as is any other officer in the land department to misconstrue the provisions of a pre-emption act. The act done in *both* cases relates merely to the *sale* of the public lands. Why then, when private rights have been invaded, should the door of the Courts be thrown open in the one case, and closed in the other? We look in vain to the provisions of the act to find a reason for such a distinction; and when we look outside the act, we are equally unsuccessful.

The phraseology, "and to finally determine the right of each claimant or occupant to purchase," etc., contained in the 5th section of the act, must be construed as meaning a finality as to investigation by officers in the land department, Such was the construction put by this Court, in *Johnson vs. Towsley supra*, upon stronger language used in the 10th section of the act of Congress of June 12, 1858.

11 Stat. at Large, 326.

The circumstances which lead to the passage of the act may be here referred to:

All that portion of the Hot Springs reservation on which the Springs is situated, with much of it in the immediate vicinity of the Springs, was claimed many years since by different individuals under what each supposed to be a valid title. As to part of the lands their claims of title were in conflict; and they commenced and continued litigation with each other until this Court, in what is known as the Hot

Springs Cases, (92 U. S. 698), decided that neither of the claimants had title to any part of the reservation, and that the title to the whole of it was in the United States. Pending this litigation people settled on lands at or near the Springs. Some under conveyances from or contracts with the individuals who claimed title, and others as mere squatters on the reservation; until, in the process of time a town grew into existence, and became celebrated for its thermal waters. Such was the state of affairs when this Court decided that the title was in the United States; and it was left for Congress to determine what disposition should be made of the reservation, including as it did, among other improvements, the Town of Hot Springs. Soon afterward Congress passed the act of March 3, 1877; and by its provisions, a portion of the reservation sufficiently large to include all the hot water was to be carved out, by metes and bounds, as a future reservation; and the residue thereof, embracing the greater part of the Town of Hot Springs, after having been surveyed and laid off into squares, blocks, lots, avenues, streets and alleys, was to be sold in the manner prescribed by the act, giving certain persons the preference to purchase by reason of improvements made upon the land.

Now, it was not practicable to impose the performance of these duties upon the regular land officers of the government, not because they were incompetent to perform them, but because they could not do so, and at the same time give the necessary attention to their ordinary official business. It was an emergency which called for additional *executive* force, *not judicial force*, and it was supplied in the appointment of the Commissioners. Under the act they were to be *three* discreet and competent persons to be employed, for a limited time, in the exercise of functions properly belonging to the executive officers of the government; and hence it was not deemed necessary, and the act did not provide, that there should be an appeal from their finding to the Secretary of the Interior or to any other officer in the executive department, and their decision was made final, but obviously, *only as to that department*; and *never* in the sense which would deny to a party injured by a misconstruction of the act such remedy as he otherwise would have in the Courts. According to the practice of the departments and the decisions of this Court, the duties devolved on the Commissioners were ministerial; and they were a special tribunal only as the Register and Receiver may be regarded as a special tribunal for like purposes, and occupied no higher ground. No judicial power was necessary, none was intended to be conferred, and none was conferred.

In the performance of their duties the Commissioners stood in the same attitude as that of the Register and Receiver; and it has been repeatedly held by this Court, that, although the decisions of the officers of the land department on controverted questions of fact, in the absence of fraud, imposition or mistake are conclusive in the Courts; yet where, in the application of the facts as found by them, they, by misconstruction of the law, take from one party that to which he has acquired a right under

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Johnson vs. Towsley Supra.
Moore vs. Robins, 96 U. S., 530.
Shepley vs. Cowan. 91, U. S., 330.
Minnesota vs. Batchelder, 1 Wall, 109.
Silver vs. Ladd, 7 Wall, 219.

2. The decision of the Court below, as to the merits of the case, is on the theory that the lease of the Appellant to Gibbon and Kirkpatrick was of no validity; because Appellant's claim of title to the premises, at the time the lease was made, was afterward by the decision of this Court declared to be invalid; or, in other words and in effect, that Appellant, at the time of making the lease, stood in the attitude of a trespasser on the public lands of the United States.

That New Madrid certificates, issued to persons whose lands had been destroyed by earthquake, were subject to be located by the grantee, or his assignee, upon any public land in the territory of Missouri, is a proposition that cannot be denied. That the land in the Hot Springs reservation on which it was attempted to locate the 'Langlois certificate, was at that time subject to location in satisfaction of that certificate; and that the location of the certificate upon land embracing the Hot Springs, by Hammond and Rector, was regular in all things, except that the survey of 1820 was not returned to the office of the recorder of land titles, are questions that have been judicially determined by this Court in the affirmative.

92, U. S., 698.

And it was for the reason only that the survey of 1820 had not been returned to the office of the recorder of land titles that the Supreme Court determined that the land embraced in the New Madrid Survey had not become so appropriated to the claimants as to give them a vested right, and prevent the operation of the act of April 29, 1832, by which it was reserved to the United States.

The title of Appellant, it is true, was defective for the reason mentioned by this Court. His title was defective not because the lands could not lawfully be appropriated to the satisfaction of 'Langlois' certificate, at the time of the making of the survey of 1820, and the location of the same on the Hot Springs, but because enough was not done to make the appropriation effectual. His title was invalid against the United States, not because the lands could not be lawfully segregated from the public domain, but only because of the omission of an act necessary in law to segregate them; not because it was unlawful to attempt to do what was intended to be done, but because something essential to the validity of the transaction was left undone. This Court suggested no other defect in Appellant's title save the omission to return the survey to the recorder' office. There is no intimation that the location was unlawful or fraudulent, or that any of the acts which were done were in violation of law, or by an officer who had n authority, or who had acted contrary to his authority.

possession, and the title can only be drawn in question so far as is necessary to determine the right to the possession. The very gist of the action is injury to the possession, and the general rule is that unless at the time of the trespass the plaintiff was in actual possession, trespass cannot be supported.

Vol. 1, Chitty's Pleadings, page 175.
Stuyvesant vs. Tompkins, et al., 9 Johns, 61.
Wichham vs. Freeman, 12 Johns, 183.
Addleman vs. Way, 4 Yates, 218.
Allen vs. Thayer, 17 Mass., 299.

Here the possession was in Appellant, under a grant of the Government, defective to be sure, yet not so defective as to render it absolutely void. Had the Government brought an action of trespass, *qu cla freg*, against Rector, the production of the patent certificate issued upon the location of the 'Langlois certificate, and proof of Appellant's possession under that location, would have been a complete answer to such action, and the Government would have been left to determine the question of title in some proceeding appropriate for that purpose. And such was the opinion of the Congress of the United States, as we will presently see. The title of Appellant to the New Madrid survey was *prima facie* valid; it was voidable, not void, and could be avoided by the Government only, and it was bound thereby until the location of the 'Langlois certificate had been set aside in some proceeding instituted by the Government for that purpose.

The Government of the United States is bound in respect to her public domain by the *lex rei citae*, where no cession of the jurisdiction has been made, and when the laws of Congress have not otherwise provided.

In the case of the *United States vs. Ames, 1 Wood & Minot, 76*, it is adjudged, that if the United States own lands in any State, and there is no cession of the jurisdiction the *lex rei citae*, applicable to the land owners of the State, govern as to the rights and remedies, equally applying to non-residents and citizens when the laws of Congress have not otherwise provided. When Congress has provided no adequate and exclusive remedy for injuries to public property, then the Common law or the laws of the State apply.

Note to Page 474, 1 Vol.
Kent's Commentaries.

In the case of *Mitchell vs. Parker, 25 Mo., 34*, which was an action of ejectment, the defendant relied upon no title in himself, but attempted to defeat the plaintiff's action by showing that there was no title in him. The plaintiff to support his title, gave in evidence a title derived under the location of a New Madrid certificate, issued to John Baptiste Barsoloux. The defendant, to show a want of title in the plaintiff, gave in evidence facts tending to prove that the issuance of the New Madrid certificate under which plaintiff claimed, was fraudulently procured. Upon this state of facts, claimed to have been proven, the defendant insisted that the certificate under which plaintiff claimed, was void and conferred no title on him.

The Supreme Court of Missouri in deciding the case say; "From the view we take of this matter, it is not necessary for us to affirm or deny the truth of the facts assumed in this proposition. The inference drawn from the facts, we do not admit to be correct. It may be that the two confirmations are for the same tract of land; that the two New Madrid certificates are for the same field, and that there was fraud and mistake in the proceedings, about which we give no opinion, and do not wish to be understood as insinuating there were any; yet the defendant is not entitled to withhold from the plaintiff the land in controversy.

"It is true, if the proceedings under which certificate No. 119 was issued, were regarded as nullities, the plaintiff would have no right to disturb the defendant in his possession. But there is a distinction between void and voidable acts. A matter which is voidable is effectual until it is avoided by him to whom it is prejudicial; so long as he acquiesces in the act, it is not for third persons to complain of its irregularity. But when an act is void, it is as though it had not been done, and consequently it can not be made to affect any one. The terms void and voidable are frequently confounded by law writers, they using the word void when speaking of an act that may be avoided by suit or plea. Admitting that certificate No. 119 was issued through mistake, and that it ought not to have been issued; yet, as it did issue, and was located, it conferred title as against the United States; and so long as their act is acquiesced in, it is not for strangers to interpose and say the Government has been wronged. Until the Government sees fit to vindicate its claim by setting aside the voidable act, it is not for third persons to interfere in its behalf.

In the case of *Stewart vs. Rector, 1 Mo., 256*, it was held "that a New Madrid certificate obtained through fraud and mistake was not void, but only voidable, and that so long as it is not avoided it stands good to all intents and purposes."

It must be constantly borne in mind that Appellant entered into the possession of the New Madrid survey, by virtue of the location of the 'Langlois certificate, made in 1820, long anterior to the passage of the act of 1832, reserving the Hot Springs from sale, and consequently that act could in no-wise affect his right to enter into the possession of the New Madrid survey, so long as the validity of the location remained undetermined. Indeed whether the act of 1832 could affect the land embraced in the New Madrid survey, depended entirely upon the validity of the location of the 'Langlois certificate. If the location was valid, the lands embraced therein had already been sold at the passage of the act, and in that case the act of 1832 could have had no force to reserve from sale, that which had already been sold.

The act of Congrees of March 3d, 1807, (2 Statutes at Large, 445), can have no bearing on this case. That act was never intended to apply to persons who entered into possession under a colorable title derived from the Government, but only to prohibit persons from taking possession of and making settlements on lands, which were confessedly the Government's, and to which the persons taking such possession, or making such improvements, had no pretence of title. This statute, if it was ever intended to have effect according to its literal import, was short lived.

Before the year 1820, Congress had passed the law relating to the location of New Madrid certificates, and had granted the right of pre-emption upon the public lands, the last act requiring possession to be taken and improvements to be made as the condition upon which a title could be acquired to the land. Since then various pre-emption and homestead acts have been passed, whereby the people have been encouraged to enter upon, take possession of and make improvements on the Government lands, the effect of which legislation, has been to introduce a more enlightened and liberal practice in relation to the public domain, than that indicated by the act of March 3, 1807, and whereby it has been repealed, and has accordingly been left out of the revision of the Federal laws. The act of March 3d, 1807, must have been regarded by the Supreme Court of the United States, as being no longer of any force at the time of the rendition of the decision in the case of,

Lamb vs. Davenport, 18 Wal., 313.

In that case the Supreme Court of the United States, say: "There is no question that at the commencement of this suit the legal title to the lots was in the heirs of Lownsdale. The equity which Davenport sets up in his cross bill, arises from transactions antecedent to the issue of the patent certificate of Lownsdale, and indeed antecedent to the enactment of the donation law by Congress, under which Lownsdale's title originated.

"It is not necessary to recite in this opinion all those tranactions. It is sufficient here to say that several years before that act was passed, and before any act of Congress existed by which title to the land could be acquired, settlements on and cultivation of a large tract of land, which includes the lots in controversy, had been made, and a town laid off into lots, and lots sold, and that these are a part of the present city of Portland. Of course no legal title vested in any one by these proceedings, for that remained in the United States, all of which was well-known and undisputed. But it was equally well-known that those possessory rights and improvements, placed on the soil, were by the *policy* of the government, generally protected, so far at least, as to give priority of the right to purchase whenever the land was offered for sale; and when no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general *recognition of them in the end by the Government*, and its *disposition to protect the meritorious actual settlers*, who were the pioneers of emigration in the new territories, gave a decided and well understood value to these claims. They were the subject of bargain and sale, and as among the parties to such contracts, they were valid. The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the Government may be sold or given away is undoubted; but subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases when Congress *had imposed restrictions* on such contracts."

This opinion directly holds that persons may, according to the law as it existed at the date of the rendition thereof, Before the year 1820, Congress had passed the law relating to the location of New Madrid certificates, and had granted the right of pre-emption upon the public lands, the last act requiring possession to be taken and improvements to be made as the condition upon which a title could be acquired to the land. Since then various pre-emption and homestead acts have been passed, whereby the people have been encouraged to enter upon, take possession of and make improvements on the Government lands, the effect of which legislation, has been to introduce a more enlightened and liberal practice in relation to the public domain, than that indicated by the act of March 3, 1807, and whereby it has been repealed, and has accordingly been left out of the revision of the Federal laws. The act of March 3d, 1807, must have been regarded by the Supreme Court of the United States, as being no longer of any force at the time of the rendition of the decision in the case of,

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"It is not necessary to recite in this opinion all those tranactions. It is sufficient here to say that several years before that act was passed, and before any act of Congress existed by which title to the land could be acquired, settlements on and cultivation of a large tract of land, which includes the lots in controversy, had been made, and a town laid off into lots, and lots sold, and that these are a part of the present city of Portland. Of course no legal title vested in any one by these proceedings, for that remained in the United States, all of which was well-known and undisputed. But it was equally well-known that those possessory rights and improvements, placed on the soil, were by the *policy* of the government, generally protected, so far at least, as to give priority of the right to purchase whenever the land was offered for sale; and when no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general *recognition of them in the end by the Government*, and its *disposition to protect the meritorious actual settlers*, who were the pioneers of emigration in the new territories, gave a decided and well understood value to these claims. They were the subject of bargain and sale, and as among the parties to such contracts, they were valid. The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the Government may be sold or given away is undoubted; but subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases when Congress *had imposed restrictions* on such contracts."

This opinion directly holds that persons may, according to the law as it existed at the date of the rendition thereof, Oct. 1873, not only lawfully enter upon and improve public land at a time when there is no law by which a title can be obtained, but that they may make valid contracts, even concerning the title, predicated upon the hypothesis that they may thereafter lawfully acquire titles, except in cases when Congress has imposed restrictions on such contracts; something that certainly could not have been done if the provisions of the act of Congress of March 3, 1807, had still remained in force. And see to the same effect:

Sporrow vs. Strong, 3 Wall., 97.
Myers vs. Craft, 13 Id.
Davenport vs. Lamb, Id. 418.
Thredgill vs, Pintard, 12 How., 24.

The statute laws of this State have recognized the rights of persons situated identically as Gov. Rector was, and in construing these statutes, the Courts of this State have repeatedly declared that Rector had a possession of the New Madrid survey, good as against all the world except the Government of the United States; and these decisions have been approved by the Federal Courts.

Section 2254 of Gantt's Digest of the Laws of Arkansas provides that an action of ejectment (now called an action for the recovery of real property) may be maintained in all cases where the plaintiff claims title under and by virtue of:

First—An entry made with the Register and Receiver of the proper land office of the United States.

Second—A pre-emption right under the laws of the United States.

Third—Where an improvement has been made by him on any of the vacant lands of the United States, whether the lands have been surveyed or not, and when any other than those to whom the right of action is given by the preceding clause of this section is in possession of such improvements.

Section 2256 provides that it (an action of ejectment) may be instituted upon patent certificates issued by the recorder of land titles for Missouri Territory upon New Madrid locations, and maintained against defendants not having a better title.

And section 2260 provides that if the plaintiff prevail in the action he shall recover by way of damages the rents and profits down to the time of assessing the same, except when the plaintiff, or those under whom he claims title, may have entered in any Land Office in this State, the improvement of the defendant, and the action is brought to recover the possession of such improvements, in which case the plaintiff shall recover no damages.

These provisions of law have all been in force since the year 1852; and, as we have already said, have been repeatedly construed by our Supreme Court, and these constructions approved by the Federal Supreme Court.

Among the earliest cases in our Reports on this subject, is *Pelham, Adm'r., vs. Wilson et al., 4 Ark., 289.* In that case the Court say:—"The interest that a party possesses in an improvement on public lands, is of a peculiar character, known only to our laws. He certainly has a possessory right or interest against all the world but the

United States, and this is secured to him upon the principles of natural justice."

In *Cain* vs. *Leslie*, 15 Ark., 312; the Court say;—"But the sale of improvements on public lands is recognized by our law, and the complainant by his purchase from Stout acquired a possessory right which the law protects, and which is good against everybody but the Government or its grantee." And see to the same effect.

Glanton vs. *Anthony*, same volume, 543.
Hughes vs. *Sloan*, 8 Ark., 146.
McFarland vs. *Matthias*. 10 Ark., 567.

In the case of *Gaines et al*, vs. *Hale and Rector*, 26 Ark., 192, an appeal from the ruling of the Hot Springs Circuit Court in Chancery, upon a bill brought by Rector and Hale, to restrain the execution of a judgement in ejectment, the Supreme Court say: "It is insisted on the other hand that the validity of Belding's claim is not now in issue; that the plaintiffs must recover on the strength of their own title, and not on the weakness of that of the defendant; that Hale and Rector are trespassers; that they have no rights to maintain, no injuries to redress."

"We concede the legal position taken by the counsel for Belding to be true, but not the facts. Settlers making valuable improvements on the public lands, which at the time are not reserved for the exclusive use of the Government, have not been regarded as trespassers. This state by statute treats and protects such improvements as property, and enforces the right of possession as against all persons who have neither a legal or equitable title."

In the case of *Gaines et al.* vs. *Hale*, 16 Ark., 9, the Supreme Court decided that the Receiver's receipt and certificate of purchase by a pre-emption claimant, though accompanied by a note under the direction of the General Land Office that the pre-emption conflicts with other claims to the same land, is sufficient evidence of legal title to sustain an action of ejectment, and that such a title cannot be impeached by evidence tending to show that, upon the merits, a pre-emption ought not to have been allowed, and the doctrine of this case is referred to and affirmed in the case of *Rector et al.* vs. *Gaines et al.*, 19 Ark., 70, which case was affirmed, 22 Howard, 144, by the Supreme Court of the United States.

The case of *Dupass* vs. *Wassell*, 1 Dillon, 213, decided in the United States Circuit Court for the Eastern District of Arkansas, by implication decides that the old claimants and those holding under them were not trespassers on the Hot Springs reservation; and see also,

McFarland vs. *Mathis*, 10 Ark., 563.

But not only had Appellant a "peculiar title," protected by the courts of this State, recognized by the United States Courts, and a possession good against all the world except the United States, but this very same title and possession have been recognized by the Congress of the United States, the sovereign department of government, and which alone has the right to dispose of the public lands. The act of Congress entitled "An act in relation to the Hot Springs Reservation in Arkansas," approved June 12th, 1870, is an explicit recognition that there were titles legal or equitable set up by some persons to some part of the Hot Springs Reservation. The Congress of the United States must be presumed to have known by whom titles to land in the reservation were claimed, and the nature and character of these titles, and knowing this, Congress regarded the titles set up to these lands to be of sufficient dignity and solemnity to entitle those claiming under them to be heard in the Courts of the Government as to the question of the validity of their titles.

This act provides "that any person claiming title, either legal or equitable, to the whole or any part of the four sections constituting what is known as the Hot Springs Reservation, in the State of Arkansas, may institute against the United States in the Court of Claims, and prosecute to final decree any suit that may be necessary to settle the same."

16 U. S. Stat. at Large 149.

In pursuance of the provisions of this act Appellant brought his suit against the United States, in the Court of Claims, which terminated in a judgement against the validity of his title, and not in a judgment against him, that he was a naked trespasser, intruding upon public lands, with out claim or color of right. The Court of Claims and the United States Supreme Court took cognizance of the claim of Appellant upon the facts stated in his petition, tried the case on the facts alleged as constituting his title, and these facts must have been such as in the judgment of these courts were sufficient to show a claim (color) of title in Appellant of a charecter to bring him within the meaning of the act of Congress. The privilege to sue the Government was given to those claiming title, and not to trespassers. To bring one claiming title within the provisions of the act, he must have claimed by title derived from the Government, and to have given him a standing in court he must have disclosed by his pleadings a state of facts showing that he had a claim of title against the government. Less than this would not have satisfied the statute, and a complaint to the Court of Claims which did not show a claim by title alleged to have been derived from the United States, would have given the claimant no standing in the Court. A mere showing of possession, however long continued, would not have sufficed; for from possession no presumption of title can arise against the Government.

The Congress of the United States perfectly well understood, that body was thoroughly informed and well knew what claims of title were set up to property in the reservation, and how they were claimed to have been derived; and knowing this they deemed these claims of title of sufficient *prima facie* validity to entitle them to be passed upon in the National tribunals. Congress, by this act, recognized the fact that Appellant set up a claim of title to lands in the Hot Springs reservation, and that this title had such color of validity as to preclude the Government from denying his title and treating him as an intruder, until the legal sufficiency of his title had been determined by the judgment of some Court of competent jurisdiction, in a proceeding instituted for that purpose. Of such dignity and importance, of such presumptive validity, was the claim of title on the part of Appellant, that Congress waived the Nation's sovereignty, opened the doors of her Courts and permitted him to sue the Government therein, and to contest with it the question of title to a part of the Hot Springs reservation. Indeed Congress, by permitting the Government to be sued, admitted that there was a question to be determined in a judicial proceeding as to whether, under all the circumstances, the title to the land claimed by Appellant was in law in Appellant or in the United States. Congress regarded Rector as one making a *bona fide* claim of title, under all the circumstances and conditions of the case, clothing that title with colorable validity and not as a trespasser; not as one being in by wrong. Had Congress esteemed Appellant a trespasser upon public lands, can it be believed that the course of legislation would have been what it has? When has it been the course of the Nation to open its Courts that itself might be sued by one who was trespassing on the public lands merely to determine the question as to whether he was a trespasser or not? No new legislation was needed to enable the Government to deal with trespassers; her courts and laws were already sufficient for that purpose. Who will pretend to believe that Congress, regarding Appellant as a trespasser, still opened the Federal Courts to him to sue the Government? If such absurdity could in any event be attributed to Congress it has relieved itself of the imputation by the express words of the act, giving jurisdiction of the matter to the Court of Claims. The act declares that any person claiming title, etc., may institute in the Court of Claims, and prosecute to final hearing and decision any suit that may be necessary to settle the same. The Congress designed, and so declared, to finally settle a question of title, not a question of trespass. The act is a recognition of the lawfulness of Appellant's possession, and of his right to a trial, as between him and the Government, of the validity of his title. The Government has ever treated Appellant as being in by color of title, and has repeatedly recognized his possession under under that title, and if upon technical principles he could have been regarded as a trespasser, whether he should be so regarded or not, was for the determination of the Government. If the Government did not elect to treat him as such, but as one having claim of title, this is conclusive of the question, and no one else can be heard to allege that he was a trespasser to defeat any right he may have under the act of March 3, 1877.

Mitchell vs. Parker, 22 Mo., 34.
Hunter vs. Hemphill, 6 Mo., 71.

So impressed was the Court of Claims with the justness of Appellant's claim, and the legal sufficiency of his title, although feeling itself constrained to decide against him by the existing adjudications of the United States Supreme Court, that it used the following lauguage:

"While we do not feel satisfied with the construction which has been given directly or indirectly to the statute, and while we think the facts in this case will present substantially a new question to the Supreme Court, upon which it will not be bound by its former ruling in other and essentially different cases, yet still we do not feel at liberty to disregard what that Court of last resort has so repeatedly said, and deem it best to leave to that tribunal the duty of correcting its errors, if errors they be. We must, therefore, him to sue the Government therein, and to contest with it the question of title to a part of the Hot Springs reservation. Indeed Congress, by permitting the Government to be sued, admitted that there was a question to be determined in a judicial proceeding as to whether, under all the circumstances, the title to the land claimed by Appellant was in law in Appellant or in the United States. Congress regarded Rector as one making a *bona fide* claim of title, under all the circumstances and conditions of the case, clothing that title with colorable validity and not as a trespasser; not as one being in by wrong. Had Congress esteemed Appellant a trespasser upon public lands, can it be believed that the course of legislation would have been what it has? When has it been the course of the Nation to open its Courts that itself might be sued by one who was trespassing on the public lands merely to determine the question as to whether he was a trespasser or not? No new legislation was needed to enable the Government to deal with trespassers; her courts and laws were already sufficient for that purpose. Who will pretend to believe that Congress, regarding Appellant as a trespasser, still opened the Federal Courts to him to sue the Government? If such absurdity could in any event be attributed to Congress it has relieved itself of the imputation by the express words of the act, giving jurisdiction of the matter to the Court of Claims. The act declares that any person claiming title, etc., may institute in the Court of Claims, and prosecute to final hearing and decision any suit that may be necessary to settle the same. The Congress designed, and so declared, to finally settle a question of title, not a question of trespass. The act is a recognition of the lawfulness of Appellant's possession, and of his right to a trial, as between him and the Government, of the validity of his title. The Government has ever treated Appellant as being in by color of title, and has repeatedly recognized his possession under under that title, and if upon technical principles he could have been regarded as a trespasser, whether he should be so regarded or not, was for the determination of the Government. If the Government did not elect to treat him as such, but as one having claim of title, this is conclusive of the question, and no one else can be heard to allege that he was a trespasser to defeat any right he may have under the act of March 3, 1877.

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But the muniments of title held by Appellant were such as were sufficient to confer color of title upon him.

Where one in possession of land claiming title , pursuant to a state of facts which of themselves show the character and extent of his claim, such facts perform sufficiently the office of color of title.

Bell vs. Longworth, 6 Ind., 273.
Doe vs. Hearick, 14 Ind., 242.

Color of title is anything in writing connected with title which serves to define the extent of the claim.

Walls vs. Smith, 19 Ga., 8.

Any deed, though unrecorded, purporting to convey title, no matter on what founded, is color of title.

Lea vs. Pope Copper Co., 21 How., U. S., 495.
Dickinson vs. Breeden, 30 Ill., 279.

Nor does it matter how defective the document of title may be.

Pillow vs. Roberts, 13 How., U. S., 472.
Hanna vs. Renfro, 32 Miss., 125.

In Illinois it is held that color may be given without any writing, and may commence in trespass.

McLean vs. Kellogg, 17 Ill., 498.

And the deed may be merely void, and yet it will give color of title.

Ewing vs. Burnett, 11 Pet., 41.

An unregistered quit claim deed of all a grantor's title under a collector's deed conveying no interest, gives color of title.

Minot vs. Brooks, 16 N. H., 374.

So does the deed of an attorney who had no authority.

Hill vs. Wilson, 2 Murphy, N. C., 14.

And a deed founded on a void decree of a Court of Chancery gives color of title.

Whitesides vs. Singleton, 1 Meigs, 207.

In like manner the deed of a minor gives color of title.

4 Dev. and Batt., N. C., 289.

Possession of land under a grant from the State is possession under color of title, even when the grant is void for irregularity, if the tenant enter under it in good faith.

Moody vs. Fleming, 4 Ga., 115.

A defective deed taken in good faith, though the defect is apparent on its face, gives color of title.

Edgerton vs. Bird, 6 Wis., 537.
Chickering vs. Failes, 29 Ill., 294.

Then upon both reason and authority, it is clear that Appellant was not a trespasser. He was in under the location of the New Madrid certificate, made long before the passage of the act of April 29, 1832, reserving the land to the United States. Had that location been perfected in all things according to the acts of 1815 and 1822, his title would have been good against the Government; but the location was not so made, and his title on that account failed.

Appellant claimed to be a tenant in fee, but he turned out to be a tenant at sufferance of the United States, in whom the legal title was. While the question of title remained undetermined between him and the Government, his possession was lawful, and all contracts made during that time between him and others touching the possession were lawful and binding on the parties thereto, and have been so recognized, as we have shown, by repeated decisions of the Supreme Court of Arkansas, as well as by the decision of this Court, (3 Otto, 3), where it is decided that Rector is entitled to the improvements erected by him on the New Madrid survey, as against everybody except the United States. But if Appellant in respect to his possession and occupancy of the New Madrid survey, was a trespasser on the lands of the United States, how is the condition of the Appellees who entered and held under him as his tenants, up to and on the day of the rendition of the decision in the Supreme Court of the United States any better than his?

They admit that they came into possession under him, and as his tenants: that they were holding under him, and for him on the 24th day of April, 1876, and not for themselves, and had all the time attorned to and paid him rent for the land they occupied.

If Appellant was a trespasser and tenants entered to hold under him, certainly they likewise were trespassers; for one trespasser cannot confer title upon another as against the true owner; yet, as between trespassers, he that has the oldest possession has the better attitude. Nor will it benefit those who were tenants of Appellant on the 24th day of April, 1876, were it admitted that he was a trespasser from the first to the last. His rights would remain just the same under the act of March 3d, 1877, touching his claim to purchase land by virtue of the improvement erected for him by his tenants under contracts of lease.

LeRoy vs. Cunningham, 44 Cal. 607.

But the position of Appellant's tenants, that he was a trespasser is not only not well taken in law; but were it so, that indeed he had been a trespasser on Government land, and leased a part of his possession to those who were his tenants on the twenty-fourth day of April, 1876, they could take no advantage of the fact. The tenant cannot dispute his landlord's title, nor set up any right claimed to have been derived while the tenancy existed, and by virtue thereof, to defeat the title and rights of his landlord—sec. 705 Taylor's Landlord and Tenant. To enable the tenant to dispute the title of his landlord, he must first surrender his possession; and to enable Appellant's tenants to claim title to improvements which they erected under their leases, even had they first abandoned the possession, they must show a title acquired thereto from some one who had a title superior to Appellant's. They cannot admit, as they have done by their pleadings, that they built the improvements under contracts of lease, whereby they were to become the property of Appellant, and now claim these improvements as their own, in violation of these contracts, merely because there was some defect in Appellant's title, whereby it failed, or because his possession thereof was wrongful as against the United States at the time of the execution of these contracts. Appellant's tenants cannot admit the contract of lease and the terms thereof, as they have done, and then avoid the effect of the contract in the manner they attempt to do. The parties who entered into possession under Appellant, and remained his tenants, until April 24, 1876, are now estopped to deny his authority to make the leases, or to question the effect thereof, on account of any defect in his title.

The following authorities are in point to establish our position: In the case of *Morse vs. Roberts, 2 Cal. 514*, the Supreme Court of the State decide that a lessee admits the title of his lessor by taking a lease from him. The same Court have decided (*2 Cal., 558*) that the relation of landlord and tenant, when the landlord is an alien non-resident, is obligatory upon the tenant, and that he cannot be permitted to contradict the title of his lessor.

In the case of *Doe ex. dem. Lockwood et al., vs. Walker 3d McLane*, the Court decides that a stranger who obtains possession through a tenant by purchase of the land, cannot dispute the landlord's title.

See also *LeRoy vs. Cunningham, Supra.*

In the case of *Earl's, Adm'x., vs. Hale's Adm'r., 31 Ark., 470*; which was decided after the decision of thi

Court, on the twenty-fourth day of April, 1876, the Supreme Court of the State of Arkansas say:

"The grounds of the defense are that Hale had no title to the land, and that the defendants did not rent of him, and are not his tenants."

* * * * * * * * *

"The question presented is not whether the plaintiff had title or not to the land and house, but whether the defendants derived their rights of use and occupancy of the house from plaintiff. If such was the case, it is well settled that the tenant cannot deny the title of the landlord under whom he entered."

Clem vs. Wilcox, 15 Ark., 102.

"If, however, the title of the landlord is extinguished, and the legal title has passed to another, then, from that time, the tenant might interpose such defense, because after the landlord had parted with his title, the tenant would be responsible to the true owner. In *Bettisen vs. Budd, 17 Ark., 452;* it was held that so long as the title remained as it was when the tenancy accrued, the tenant has no right to question the landlord's title."

"The entry under Taylor's lease was in effect an entry under Hale. By force of the assignment of the lease defendants took the place of Taylor, and were under like obligations to Hale. The payment of rent to Hale, after they entered under Taylor, was an acknowledgment of the relation of tenant and landlord."

Rowle on Covenants, pp. 158, 159.

the property of Appellant, and now claim these improvements as their own, in violation of these contracts, merely because there was some defect in Appellant's title, whereby it failed, or because his possession thereof was wrongful as against the United States at the time of the execution of these contracts. Appellant's tenants cannot admit the contract of lease and the terms thereof, as they have done, and then avoid the effect of the contract in the manner they attempt to do. The parties who entered into possession under Appellant, and remained his tenants, until April 24, 1876, are now estopped to deny his authority to make the leases, or to question the effect thereof, on account of any defect in his title.

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Rowle on Covenants, pp. 158, 159.

Smith's Landlord and Tenant, 238, note.
2 Smith's Leading Cases, p. 611, et seq.
Bowlish vs. Dubuque, 38 Iowa, 341.
Fuller vs. Scott, 30 Mich., 237.
Ehrall vs. Omaha Hotel Co., 5 Neb., 295.
Lucas vs. Brooks, 18 Wall., 436.
Peralta vs. Ginochio, 47 Cal., 459.
And see particularly *Holloway vs. Galliae, Ib., 474.*
Stout vs. Mervill, 35 Iowa, 47.

"For reasons of public policy, a tenant is never," says Mr. Taylor, (*Sec. 629 Taylor's Landlord and Tenant*), "allowed to dispute his landlord's title, after having accepted possession under him. A lessee by indenture, is technically estopped from denying it; and this seems to have been the origin of the rule, and the only occasion of its occurrence at common law. But it is now of general application whenever possession has been taken under any species of tenancy, whether the action is assumpsit, debt, covenant or ejectment."

And at section 705 of this work, the same author says: "No proof of title is required in this action, (ejectment) when it is brought by the landlord, since if a tenant has once recognized the title of the plaintiff, and treated him as his landlord by accepting a lease from him, or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted, and that whether the action be debt, assumpsit, covenant, or ejectment, for it is a general rule, founded on reasons of public policy, that a tenant shall never be permitted to controvert his landlord's title, or set up against him a *title acquired by himself during the tenancy*, which is hostile in its character, to that which he acknowledged in accepting the demise, and this rule extends to a tenant holding over, as well as an under-tenant, assignee, or other person claiming under the lessee; and is applicable to every species of tenancy, whether for years at will or by suffrance. As a tenant is not permitted to resist the recovery of his landlord, by virtue of an adverse title acquired during the tenancy, if he takes a lease from a third person, it is void, and cannot work an adverse possession against his landlord, for the possession of a tenant is the possession of his landlord."

This Court in *Lucus vs. Brooks, 18 Wal., 451*, uses the following language: "Before proceeding to consideration of the several errors assigned, it may be remarked that if the defendant was in possession under a lease from the plaintiff, or from any one to whose reversion the plaintiff had succeeded, he was not at liberty to controvert the title of the plaintiff, or of that reversioner, while he remained in possession.

"In view of this undoubted principle, it is impossible to see how he could have resisted a recovery, if in fact he was the tenant of the plaintiff, or if the plaintiff had succeeded to the title of R. D. Shepherd. But it is very plain that during the lease of 1859, he was Shepherd's tenant, and that after its expiration he continued a tenant from year to year under that lease; unles the one made in 1861, or that made in 1865, supplants it. Both of the later leases were made to his wife; as he did not dissent, they became her chattels real, and during the coverture they belonged to him. Necessarily, therefore, his possession was in law under those leases, or one of them, or it was as a tenant of Mr. Shepherd from year to year, in virtue of his holding over after the expiration of the lease of 1859.

"How then he could show, so long as he *retained* possession that Shepherd had no title, or that Shepherd held in trust for his wife, or that one, though not thus succeeding, to whom he had attorned by payment of rent, had no title or held in trust for his wife, we are not informed, nor can we be. That was a *defense* which he *was not at* liberty to use, even upon his own showing of the facts."

See also *Lytle vs. State, 22 How., (U. S.), 204.*

Upon this question the authorities are all one way, and we deem it unnecessary to trouble the Court with further citations.

The facts of this case, as admitted, are that the persons who now claim adversely to Appellant were in the possession of the property which they claim as his tenants on the 24th of April, 1876, holding under and for him.

They never, anterior to that day, had claimed to own the property, or to occupy otherwise than as the tenants of Appellant. Upon these facts, stripped of all notion that the leases between Appellant and his tenants were in any manner tainted or affected by his having been a trespasser upon Government land, it must be determined which has the better right under the act of March 3d, 1877, to purchase the land over which they are contesting Appellant or his tenants.

The act of Congress of March 3d, 1877, leaves everything in the condition in which they were found on the 24th day of April, 1876. If any one has a right now, he must have had the same right then. If anyone will avail himself of the benefit of the act of Congress of March 3d, 1877, he must now establish that he occupied such relation to the property on the day fixed in the act, as is required by it, to constitute him a beneficiary under the act. Whoever claims now under the act as claimant and occupant, must prove that he held at and before the day fixed in the act, as claimant and occupant. He must prove that he held then in the very same right in which he claims now. No one can set up now to be claimant and occupant, or claimant or occupant who was only a tenant then. He who claims the benefit of the act of March 3d, 1877, must show, giving the broadest interpretation to the act, that he claimed the improvements at and before the 24th day of April, 1876, either by ownership or occupancy. The act does not permit any one to play in one role then and another now. If the contesting claimants were Appellant's tenants on and before the 24th day of April, 1876, they are his tenants still for all the determination of their and Appellant's rights under the act of March 3d, 1877. These claimants never abandoned the possession which they received from Appellant at any time anterior to the 24th day of April, 1876; nor have they ever acquired any new right from any one having a claim or title superior to Appellant's. The act of Congress gives no one any new grounds of claim, but rather a new claim on old grounds, and whoever will set up this claim must show those grounds on which he claims to have existed within the time prescribed in the act of Congress. All the adverse claimants, who were Appellant's tenants at and before the 24th day of April, 1876, and claim now by virtue of what was done then, and while they were his tenants, have no shadow of claim to the benefits of the act of Congress of March 3d, 1877.

These adverse claimants never before the 24th day of April, 1876, claimed or occupied the improvements by virtue of which they now claim the right to buy land, within the sense of these words as used in the act. They never before that day claimed anything but to be Appellant's tenants. It is true they occupied, but not in their own right, or by virtue of any claim which they asserted to the improvements.

But waiving all advantage of the relation of landlord and tenant existing between Appellant and these claimants, and their condition will not be bettered. They entered under contract to pay a certain rent for the ground, and to build houses thereon for Appellant, for which he agreed to pay them a certain stipulated price within a fixed time. These were valid bargains and contracts as against both contracting parties. These contracts as between Appellant and the other parties thereto, were that the other parties to the contracts would build houses on the land claimed in the reservation by Appellant, and wait with him for an agreed time for the payment of the sum of money agreed by him to be paid for such houses. The effect of the contracts is, that the parties contracting with Appellant agreed to build houses for Appellant, on the land claimed by him on time. They gave day for the payment of the price agreed to be paid for the houses. The legal force of these contracts is that the houses, as fast as they were built, became the property of Appellant ; they were henceforward his houses, and those who built them under contract had no title to, or property in them. Appellant owned the houses, and those who built them for him had a debt against him for the price agreed upon, for which they had a remedy at law. If he paid to any of them who built a house for him the price agreed upon, then as to that transaction the matter was at an end. And as to those who were not paid they had their action for the money due them according to the contract, and it would now be no answer to a suit for the demand for Appellant to say that he has lost all claim to the ground on which the houses were built; nor can those who sold the houses to Appellant by contracts of sale with him, annul their bargains and resume the ownership of what they have sold to him, and which they did not own on the 24th day of April, 1876, or at any time before, for the purpose of enabling them to claim the benefit of the act of of Congress of March 3d, 1877.

These contracts were binding and effectual when they were made. What is it that now annuls, vacates and sets them aside ? Is it the act of Congress of the 3d of March, 1877, that has had this effect; and if so, what clause of the act is it that has this effect, or that can be invoked to effect this purpose ? Certainly none. The act of Congress was not passed to avoid or invalidate contracts, or to impair their obligation; not to promote bad faith, but to carry into effect mearures of justice and equity between the Government and claimants, and between claimants and claimants. The claims of Appellant's former tenants to be let into the benefits of the act of March 3d, 1877, by reason of the grounds on which they rely, are flagitious, unfounded, and *mala fides* in the highest degree, and the exhibition of them before the Commission was a sad commentary on human nature. No one of these claimants dreamed of setting up any claim until after the passage of the act of March 3d, 1877. Before that time they admitted that Appellant was the owner of the improvements, and that they were his tenants. In the case of *LeRoy* vs. *Cunningham*, above cited, the facts and circumstances are extremely similar to what they are in the case now under consideration. The defendant, Cunningham, had bought an improvement on the land, released from military reservation by the act of Congress of July 1st, 1870, erected thereon by a tenant of the plaintiff, and he was in the actual possession of the land at the date of the passage of the said act, and he claimed that by reason of this possession he was entitled to the benefit of the act of Congress, and that the land of which he had possession ought to have been conveyed to him, and not to LeRoy, as had been done. The Court pretermitting the question as to whether the entry by the defendant Cunningham, under the circumstances was in subordition to the title of the plaintiff as landlord of Gray, from whom the defendant had bought the improvement, and for that reason, whilst withholding the possession, he could not dispute the plaintiff's title, says : "I am of the opinion that the possession of the defendant was not a *bona fide* possession within the sense of the statute." "He was an intruder upon the possession of the plaintiff and his grantor, Steinbeck, and from whom the plaintiff was entitled to recover possession by legal process."

Like the Defendant Cunningham, in the California case, the claimants in this case, waiting until the passage of the act of March 3, 1877, set up a claim which they had never before asserted, and which, if they had asserted, would have authorized Appellant to have recovered his property by process of law, as we have shown by an abundance of authority he could have done. Such a course on the part of these claimants make them intruders upon the rights of Appellant, so far as they now attempt to claim in a different right from that in which they held at and before the 24th day of April, 1876. It is true the words *bona fide* do not occur in the act of March 3, 1877, but this cannot alter the meaning and interpretation thereof. It is not to be supposed that the act was passed for the benefit of claimants whose claims are *mala fides*, as respects the rights and claims of other claimants.

See *Ricks vs. Reed, 19 Cal., 575,* and hereinafter quoted at some length,

But it was, say the claimants adverse to Appellant, the decision of the Supreme Court of the United States, and the action thereunder, which absolved them from the relations which they had sustained towards him, and relieved them from the obligation of their contracts. How the decision of the Supreme Court could have this effect it is impossible for us to see. The effect of the decision was to declare that the land embraced in the New Madrid survey was vested in the United States, free from all claim of title in Appellant, and as an incident to the land to vest the title to the improvements in the Government. The adverse claimants were not before the Court, and nothing was or could have been decreed in their favor. The decree which took the land and improvements from Appellant did not give or vest them in the adverse claimants. These claimants took nothing by the decree, nor did such of them as afterward took leases under the Receiver of the Court of Claims, acquire any rights thereby within the contemplation of the act of Congress of March 3, 1877, for this act explicitly declares that no claim shall accrue by reason of anything done since the 24th day of April, 1876. Yet it is claimed that the decision of the Supreme Court emancipated the adverse claimants from their contracts and let them in to deny the title of their landlord, because it is said that the effect of the decision. and the tenancy under the Receiver was to break the relation of landlord and tenant previously existing between Appellant and his tenants, and had the effect to place them in precisely the same condition they would have been in if they had abandoned their tenancy under Appellant. This is true, for had they abandoned their tenancy and possession thereunder, they would have had exactly nothing left whatever to have made any further claim about. The tenant cannot, by abandoning his tenancy and quitting his possession, be put into a situation to turn about and claim the lease-hold premise on the ground that he had been tenant, and had quitted and abandoned his tenancy; it takes something more than this to entitle the tenant to deny the title of his landlord. To enable the tenant to do this, he must first, in some manner, discharge himself from his relation of tenant to his landlord, and then show a title in himself superior to that of his former landlord, and one which did not grow out of, and which is in no manner connected with, his tenancy. The tenant must first abandon, in some way known to the law, his tenancy, and come in by a title distinct therefrom, and superior to the title of his landlord. Then giving to the decision of the Supreme Court, and the tenancy under the Receiver all the effect that the fullest abandonment of their tenancy could have had, and what good can it do the adverse claimants? Whence have they derived a new and distinct title to come in again? From the decree of the Supreme Court? No; for they were not parties to the decree, and it did not and could not, confer any rights upon them. From the tenancy under the Receiver? No; for the act of March 3, 1877, says that no right or claim shall accrue therefrom. From the act of March 3, 1877? No; for that act says that all claims shall be predicated upon the condition of things anterior to the 24th day of April, 1876, and during all the time before the 24th day of April, 1876, they were Appellant's tenants claiming under him, holding for him, and acknowledging his ownership of the improvements. These leases and contracts we have said were valid when made, and nothing being found in law or fact which avoids them, they are still binding, so far as to preclude these adverse claimants from all benefits as against Appellant, under the act of March 3, 1877. Both the ownership and occupancy were in Appellant, on and before the 24th day of April, 1876, and this condition of things was admitted to exist up to and on that day, by Appellees who then were his tenants, and now claim in hostility to him, and they are estopped in law to deny now what they admitted then to be the fact, and what was then in fact the true state and condition of affairs between them and Appellant.

In the case of the *United States vs. Chaboya, 2 Black, 597*, this Court, speaking by Associate Justice Miller, say:

"But in the progress of the case in the District Court (northern district of California), another paper was produced, and as it relates to this same matter of the possession, and seems to have close connection to those just mentioned, it may be well to insert it here. It is as follows:

"The Citizen Delores Pacheco, Justice of the Peace of San Jose, Guadalupe de Alvarado:

"By superior order the Senor Prefect of the First District, it is conceded to the citizen Pedro Chaballo that he inhabit the place named Posa de San Juan Baustista without building any house of foundation and much less plant trees, (plantar bienes raeses), for the term of two years, subjecting himself to pay $6 annually, and he must assist in the work on bridge, or any others by which he may be benefited. San Jose, Guadalupe de Alvarrado, February 24, 1840.

Delores Pacheco.
Pedro Chaballo.

"Notwithstanding the report of the Prefect Castro, that the claimant ought to be excused from the usual proceedure, by which we suppose he meant the procuring of an informe, that the land was vacant, the Governor did not issue a grant.

"His claim or right to the possession stood then in the same condition of dispute as between himself and the pobladores of San Jose that it had previously, when, on the twenty-ninth day of February, 1840, he entered into what may be termed a compromise with them, which is evidenced by the foregoing paper, signed by himself and the justice of the peace of that pueblo.

"We can give this paper no other construction than a renunciation by Chaboya of any right to the possession of La Posa de San Juan Bautista, and a consent to occupy it for two years under the authorities of the pueblo, paying them $6 annual rent, and submitting to the terms which they chose to impose, to prevent him from acquiring any permanent possession or interest in the land.

"There is nothing in the subsequent history of his occupation of the place to change the character of his possession. It is proven that while his cattle ranged over it, those of the residents of the village did the same.

"On the contrary, there is strong evidence that this was his construction of the character of his possession.

"After the country came under the American Government, the authorities of San Jose determined to divide the ejidos or common lands of the pueblo, including this tract, among the residents, and in doing so, allotted to Chaboya, as his share, five hundred acres around his dwelling. He accepted the instrument in the nature of a deed made to him by the Alcalde, and had it recorded.

"He was shortly after taxed by the authorities of San Jose for the entire tract of La Posa de San Juan Bautista, and it is distinctly proved by two witnesses that he appeared before the proper officers to have the tax remitted, stating that he only claimed the five hundred acres allotted to him in the partition. The tax was accordingly remitted.

"We think these facts show very clearly that the appellant never had any legal title to the land in question; that he never had any exclusive possession beyond the five hundred acres which was allotted to him by the authorities of San Jose, and confirmed by the decree of the district court, and that such possession as he did have was subsidiary to the claim of the authorities of the pueblo, and with recognition of their rights, and that the decree should be affirmed."

The claimants adverse to Rector entered into written contracts of equal solemnity with that between Dolores Pacheco and Pedro Chaballo, and were holding under these contracts on the twenty-fourth day of April, 1876. These claimants were all holding under Appellant, and in subordination to him on the twenty-fourth day of April, 1876, understood and admitted their possession to be subsidiary to Appellant's claim, and they can no more be heard now to claim contrary to the facts as they then existed, than could Chaboya, to claim contrary to the terms of the paper between him and the justice of the peace.

But it has been contended that these claimants, although admitting that they came in under Appellant by force of a contract of lease, and were holding under him as his tenants, on the twenty-fourth day of April, 1876, the act of March 3, 1877, was, nevertheless, passed for the special benefit of those situated identically as they were, and that they are brought by a personal description within the category of persons intended to be benefited by the act. That however they had reached their situation, they were in fact occupants of the improvements, on or before the twenty-fourth of April, 1876, by reason of which they now claim a right to buy land in the reservation. They say the beneficiaries mentioned in the act are those who claim land by reason of improvements made thereon or occupied by them; and that these beneficiaries are referred to throughout the act more frequently as "claimants or occupants," than as "claimants and occupants."

From this circumstance it seems to be inferred by these claimants that the meaning of the act is that a claimant by mere occupancy, when such claimant was in fact in the actual possession of improvements before and up to the twenty-fourth day of April, 1876, has a superior right to and will exclude a claimant who owned and had made the improvements within the time mentioned in the act. That the claim of one who claims merely by occupancy is superior to the claim of the owner of the improvements at and before the twenty-fourth day of April, 1876. These claimants seem to think that the word "occupant" means one who has or holds possession, merely, without regard to how he got possession, or by what right he holds.

If it were admitted that there is an ambiguity in the act because of the provision that the lands shall be claimed by reason of improvements made thereon or occupied by claimants and occupants, and because of the indiscriminate use of the conjunctions "and" and "or" between the terms "claimants" and "occupants" throughout the act, then such apparent ambiguity will but render it necessary to resort to the rules of construction to ascertain the meaning of the act. If the meaning of the act be doubtful, the intention of the Legislature in passing it must be looked for, and if it can be ascertained, it will govern in determining the meaning of the act. Independent of constitutional questions, and independent of those doctrines of liberal and strict construction, the object, and only object of judicial investigation in regard to the construction of doubtful provisions of statute, *is to ascertain the intention of the Legislature that framed the statute*. It is only where the language of the act is ambiguous that the aid of construction or interpretation can be invoked, and then, as we have said, the object is to ascertain the intention of the Legislature; and when this intention can be made out it is of absolute controlling influence in the interpretation of the act.

The means to be employed in arriving at the legislative intent arrange themselves under two heads: First, those within the statute under consideration, and secondly, those outside the statute.

It is believed that the application of this rule to the act under consideration renders it clear that it was the intention of Congress, in passing the act of March 3, 1877, to confer a benefit upon the claimant—by which term is meant one having a lawful claim to improvements on the reservation, and not upon a mere occupant who chanced to occupy such improvement, without any claim thereto. In section three it is provided that the Hot Springs reservation shall be laid out into convenient squares, blocks, lots, avenues, streets and alleys, the lines of which shall correspond with the existing boundary lines of occupants, etc. The term occupants is used in this connection for the purpose of fixing the manner of laying out the land, and not for the purpose of conferring any right upon the occupant, or any one else. In section five it is made the duty of the Commissioners to show on the map provided for, by metes and bounds, the parcels or tracts of land claimed by reason of improvements made thereon, *or* occupied by each and every such claimant *and* occupant; to hear all proof offered by such claimants *and* occupants and the United States, etc.; and to finally determine the right of each claimant *or* occupant; and further, by the way of a proviso, it is declared that such claimants *and* occupants shall file their claims, etc.; and that *no claim shall be considered* which has accrued since the twenty-fourth day of April, 1876. In the ninth section of the act the persons to be benefited are referred to alone by the term "claimants;" the word occupant nowhere occurs in this section. This section is in the following words: "That it shall be the duty of said Commissioners, without delay, to file in the office of the Secretary of the Interior the map and survey herein provided for, with the boundary lines marked thereon, and with each division and subdivision traced and numbered, accompanied by a schedule showing the name of each *claimant*, and each lot or parcel of land, the value thereof, numbers to correspond with such claim upon the map; also all the evidence taken by them respecting the *claimant's posssesory right of* the conjunctions "and" and "or" between the terms "claimants" and "occupants" throughout the act, then such apparent ambiguity will but render it necessary to resort to the rules of construction to ascertain the meaning of the act. If the meaning of the act be doubtful, the intention of the Legislature in passing it must be looked for, and if it can be ascertained, it will govern in determining the meaning of the act. Independent of constitutional questions, and independent of those doctrines of liberal and strict construction, the object, and only object of judicial investigation in regard to the construction of doubtful provisions of statute, *is to ascertain the intention of the Legislature that framed the statute*. It is only where the language of the act is ambiguous that the aid of construction or interpretation can be invoked, and then, as we have said, the object is to ascertain the intention of the Legislature; and when this intention can be made out it is of absolute controlling influence in the interpretation of the act.

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Section 11 provides that any claimant *or* occupant, his heirs or legal representatives, in whose favor said Commissioners have adjudged, etc., shall have the right to pay for land at the price fixed, etc. In section 12 it is provided that upon the failure of any claimant *or* occupant to pay the valuation fixed within the time prescribed, that the land shall be sold to the highest bidder.

And section 13 of the act declares that any claimant *or* occupant who does not desire to purchase the lands adjudicated to him or her, at the valuation fixed by said Commissioners, shall have the right to remove any improvements made on said land, at his or her own cost, before the time fixed for the payment of said lands.

Thus it appears that throughout the act the conjunctions "and" and "or" are indiscriminately used between the words "claimant" and "occupant." But the act is explicit on the point that no right to the benefit of the act shall accrue to any one except by reason of improvements on the land. True, the act says land claimed by reason of improvements made thereon, *or* occupied, but this making and occupying is to be, as the act directly declares, "by every such claimant and occupant."

It is also declared that the Commission shall return "all evidence taken by them respecting the claimant's *possessory right of occupation* ;" that the Commssioners shall issue certificates to all persons whose improvements are condemned under the provisions of the act ; that any claimant or occupant in whose favor the Commission may adjudge shall have the right to pay the valuation price of the lands, etc. ; that any claimant or occupant who does not desire to purchase the land may remove any improvements made on the land. at his or her own cost. From these provisions it would seem to be clear that it was never intended to confer any right upon one who had the mere possession of improvements. A contrary view would lead to the absurd conclusion that Congress not only intended to confer rights on persons who had none before, but to confer the right to remove improvements which had been condemned ; or, where the claimant did not choose to buy the land, upon persons who had never had any property rights in such improvements.

The evident meaning of the act, when read all together, is that the ownership of the buildings or improvements is of the essence of the right to purchase land under the act of Congress, and that without such ownership, no mere possession without title to the improvements, unless continued for a period of time sufficient to give title by prescription, will confer this right under the act, as against the actual owner of the improvements. But if it is still thought the intention of Congress cannot be ascertained by means within the act, then we may look outside the act to ascertain the intention of the Federal legislature. Then let us look outside the act and see if we can learn from the "cause and necessity of the passage of the act," or the "circumstances" which led to its passage, what the intention of Congress was? For many years Rector, Gaines and Hale had been claiming a part of the Hot Springs reservation by a claim of title from the Government, and whose claims were to some extent in conflict. Each of these claimants had, by themselves and their tenants, been for many years in the actual possession of a part of the reservation, and had made valuable improvements thereon. There were, however, quite a number of persons who had by some means intruded themselves into the land claimed by Rector, Gaines and Hale, respectively, as well as into some portion of that part of the reservation where the claims of Rector, Gaines and Hale conflicted—built houses and other improvements thereon with their means, entered into the possession thereof, and ever afterwards, denying the title of the old claimants, held in open hostility to them. Besides, many persons entered into the Hot Springs reservation outside of the land claimed by Rector, Gaines and Hale, built houses thereon, but without any claim of title to the land, and occupied these houses as mere squatters on Government land. All these persons were in the possession of the Hot Springs reservation in the manner above stated, on the 24th day of April, 1876, when this Court decided against the titles of Rector, Gaines and Hale, and that the title of the entire Hot Springs reservation was in the United States.

By this decision all the improvements on the Hot Springs reservation, by whomsoever erected, were passed to and vested in the United States, as appurtenant to the land. Thus it was that those claiming title to the land lost not only their land, but they lost also all claim and title to the buildings they had erected on the land, as did likewise all persons who had erected buildings on the reservation, whether they claimed title to the land or not. By force of this decision, the land, and everything appertaining thereto, became vested in the Government, and neither the claimants of the land nor the owners of the improvements had anything whatever left. The improvements made with the citizens' money, in a day, became the property of the Government. Although the people on the Hot Springs reservation were living in houses built with their own or the means of those under whom they held, yet they had become, by the effect of the Supreme Court opinion, the merest tenants at will of the Government, and were liable to be turned out without a moment's notice, or if they were permitted to stay in, they were held to pay rent for the houses that they had been accustomed to call their own.

This was the attitude of affairs on the 3d day of March, 1877, and with the whole matter before it, Congress passed the act under consideration. And looking to the situation of things as they then were, what intention shall be imputed to Congress in passing the act? Can it be gathered from the necessity for passing the act, or the circumstances which led to its passage, that it was the intention of Congress to give other men's houses to such persons as chanced to be in possession of them, by intrusion, trespass or as tenants, and also to confer upon such intruders, trespassers, or tenants, solely because they were in possession, a right to buy the land on which the improvements stood, to the exclusion of the owners of the improvements? Was it the intention of the Federal Legislature in passing the act of March 3d, 1877, to increase the burdens and hardships of the case by taking improvements from those who had a *bona fide* claim to them and giving them to those who had no claim whatever to them, except that they had chanced to occupy the improvements, as tenants of the owners thereof, or as intruders or trespassers upon the possession of the owners, and along with the improvements, so given to such mere occupants, to confer a right upon them to buy the land on which such improvements were erected, at their appraised value; and after all, if such mere occupants do not elect to pay for the improvements, to allow them to carry away the same?

These questions when answered in the light of the means of ascertaining the intention of Congress, whether found within or without the statue, must be answered in the negative. No such intention can be seen by looking within or beyond the act. Every reason which can be supposed to have led to the passage of the act, every circumstance surrounding its passage, imperatively forbids such conclusions. To adopt the affirmative of the foregoing questions would be to impute to Congress a spirit of injustice and oppression, and would defeat what, upon a dispassionate view of all the circumstances, appears to have been the intention of Congress in passing the act. But it has been urged that the lands and improvements were the Government's, and that Congress might have bestowed them as it pleased. This proposition may be true, but the proposition is not as to what Congress had the right to do, but it is what did Congress intend to do, for what was intended to be done, is what was done, the intention of Congress when ascertained must prevail. The land and improvements certainly were the property of the Government, and if it were admitted that Congress, in consonance with the constitution and theories of the Government, could have given them away; yet, it is to be remembered that Congress has never ceded away the nation's property, or conferred preferences or priorities, except in furtherance of public policy, or in satisfaction of some claim or equity supposed to exist between the Government and the persons in whose favor the cession is made, or the preference or priority is given. When by the decision of this Court the lands and improvements were vested in the United States, the Government might have disposed of the lands and improvements in its own way and for its own benefit, without further noticing the owners and occupants of the improvements, and none could have complained. But if Congress gratuitously bestows the improvements which were made on the reservation by one man upon another, who has no claim to them, and along with them a right to buy land by reason of these improvements, such a course would not strike the ordinary mind as in any degree equitable. It would be difficult to see why the Government should go to the trouble of establishing its title to property, as against one person, merely to give it to another, who had never had any connection with, or interest in it. There can be found in the history of our Government no precedent for such a course of legislation. Such was not the intention of Congress when it passed the act of March 3d, 1877. From all that appears from within or without this act, it is evident that Congress looking upon those who owned the improvements on the reservation, while deprived by law of their property, as having an equity in the premises, and intending to relieve those persons in some measure upon whom an evident hardship had fallen, passed the act under consideration as a measure of relief to those who had lost their improvements. If there was any ambiguity in the act, the application of every known rule of construction would preclude the interpretation claimed by the contesting claimants. But the truth is, there is no ambiguity in the act, in respect to this point, therefore, there is no room for construction. The error on the part of the adverse claimants is, that, in favor to their interest, they are inclined to give too broad a signification to the word occupant. Their inclination appears to be, to think, that the word occupancy, and the word possession, are synonymous in meaning; and if such is really their idea, they could not be more mistaken. The word occupant never has been held to include within its terms an intruder, a trespasser, or a tenant. Such is not the legal signification of the word occupant. The word occupant means in the civil law, one who has taken possession of that which before had no owner, with the intention of claiming the same as his own. Occupancy is defined by Mr. Bouvier to be "the taking possession of those things corporal which are without an owner, with the intention of appropriating them to one's own use." Pothier defines it to be "a title, by which one acquires property in a thing which belongs to nobody, by taking possession of it with a design of acquiring it." Tr du dr de Propriete, n 20. The Civil Code of Louisiana, article 3,375, nearly following Pothier, defines occupancy to be "a mode of acquiring property by which a thing, which belongs to nobody, becomes the property of the person who took possession of it with an intention of acquiring a right of ownership in it."

To constitute occupancy there must be a taking of a thing corporal, belonging to nobody, with an intention of becoming the owner of it.

The taking must be such as the nature of the thing requires.

The thing taken must belong to nobody; for if the thing were in the possession of another, the taking would be trespass or larceny; and if it had been lost and not abandoned, the taker would have only a qualified property in it, and would hold possession for the owner.

To constitute occupancy, the taking must have been with the intention of becoming the owner.

This is the civil law meaning of the word occupant, and it was in a kindred sense that Congress used the term, in the act of March 3, 1877. While the lands could in no sense be said to be something which had no owner, for they were the property of the Government, yet Congress by the use of the word occupant, meant such persons as had located on the land in the reservation, previous to the twenty-fourth day of April, 1876, and to which there was at that time no other claimant or occupant. And this is the meaning of the word occupant, as declared by the Supreme Courts of California and Nevada.

The act of Congress of May 23, 1844, "For the relief of citizens of towns upon lands of the United States under certain circumstances," authorizes the entry, at the like minimum price, of the portions of the surveyed public lands, "settled upon and occupied as a town site," by the authorities of the town, when the town has been incorporated, and when not incorporated, by the judges of the county courts of the counties within which the town is situated; such entry to be, "in trust, for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated."

In the case of *Ricks vs. Reed*, *supra*, this act of Congress came before the Supreme Court of California for construction, and Judge Field, said:

"It is true, the entry of the town lands by the corporate authorities or county judge is under the act of Congress, "in trust for the several use and benefit of the occupant thereof, according to their respective interests" but this provision does not establish that it was the intention of Congress to give the benefits of the entry to mere temporary occupants of particular tracts at the date of the entry, without reference to the character of their occupancy, and thereby, in many instances, deprive the original *bona fide* settlers of the premises and improvements in favor of those who had by force or otherwise, intruded upon their settlement.

Were such the effect of the provision in question, the *trespasser* of yesterday or the *tenant* of to-day, would often be in a better position than the parties who, by their previous occupation and industry, have built up the town and made the property valuable. We do not think Congress could have contemplated that results of this nature should follow from its legislation, but on the contrary, that it intended that the original and *bona fide* occupants should be the recipients of the benefits of the entry to the extent at least of their interest of their actual occupancy and improvements."

And in the case of *Scheler vs. Chapin, 12 Nevada, 72,* when this same act of Congress and the legislation of the State of Nevada thereunder, was under consideration, the Supreme Court of that State say:

"To be an occupant, the party must have the actual use or possession of the land. The acts necessary to constitute possession must in a great measure, always depend upon the character of the land, the locality and object for which it is taken up. But in all cases when a party relies solely upon possession, there must be a subjection of the land to the will and control of the claimant. The occupant must assert an exclusive ownership over the land, and his acts must at all times be in harmony with his title."